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Supreme Court, U.S.
FILED
JUL 1 1992
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No. 108, Original

IN THE
Supreme Court of the United States
October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S EXCEPTIONS TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER AND BRIEF IN SUPPORT OF EXCEPTIONS

DON STENBERG
Attorney General of Nebraska
MARIE C. PAWOL
Assistant Attorney General
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

SIMMS & STEIN, P.A.
446 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

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Bowne of Phoenix, Inc., Law Printers (602) 468-1012

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The State of Nebraska takes exception to certain legal conclusions in Special Master Olpin's First and Second Interim Reports of June 14, 1989, and April 9, 1992:

1. Nebraska takes exception to the Master's conclusion that the Court did not expressly apportion 75% of the inflows of the Laramie River to Nebraska in ¶ V of the North Platte Decree, as recommended by Special Master Doherty in 1944, *Nebraska v. Wyoming,* 325 U.S. 665, 667 (1945), *modified,* 345 U.S. 981 (1953);

2. Nebraska takes exception to the Master's reading of ¶ X of the North Platte Decree, 325 U.S. at 670. Paragraph X is a single sentence which provides that the provisions of the Decree which affect or restrict uses of irrigation water "shall not affect or restrict" municipal uses. While ¶ X was intended to shield municipal uses from the restrictions imposed on irrigation uses, the Special Master reads ¶ X as providing municipalities with an affirmative right to deplete the water supplies apportioned for irrigation; and

3. Nebraska takes exception to the Master's contravention of the Court's retained jurisdiction in ¶ XIII(c) to address "[t]he question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries ... between Pathfinder Reservoir and Guernsey Reservoir." 325 U.S. at 672. Paragraph

XIII(c) allows the Court to assess the impact of new tributary storage, *e.g.*, the impact of depletions of natural flow on existing irrigation storage in Guernsey and Glendo reservoirs and the Inland Lakes reservoirs of the North Platte Project. Because the exercise of the Court's jurisdiction pursuant to ¶ XIII(c) could limit new tributary storage in order to protect the existing irrigation apportionment, whether for irrigation, industrial, or municipal purposes, the Special Master concludes that ¶ X preempts an evaluation of any municipal project under ¶ XIII(c), denying the Court's jurisdiction and endorsing the very depletions the Court and Special Master Doherty sought to preclude.

The State of Nebraska urges the Court: 1) to reaffirm the apportionment of the inflows of the Laramie River in ¶ V of the Decree as recommended by Special Master Doherty and adopted by the Court in 1945; 2) to limit ¶ X to its plain and unambiguous meaning; and 3) to exercise the jurisdiction preserved in ¶ XIII(c) of the Decree.

Respectfully submitted,

DON STENBERG
Attorney General of Nebraska
MARIE C. PAWOL
Assistant Attorney General
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
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NEBRASKA'S BRIEF IN SUPPORT OF EXCEPTIONS

QUESTIONS PRESENTED

1. Did the Court expressly add 3% of the apportioned accretions inadvertently omitted from the evidence of accretions between Whalen and Tri-State Dam — the "pivotal reach of the river" — to the apportionment in ¶ V of the Decree without necessarily acknowledging the presence of 26% of the apportioned accretions which were contained in the evidence comprising the natural flow fund apportioned by the Court?

2. Is there a rational basis to support a reading of ¶ X which changes the words '[t]his decree shall not affect or restrict municipal uses' to mean 'municipal uses can upset the apportionment set forth in the provisions of the Decree?'

3. Does ¶ X, which is a qualification of the operative provisions of the North Platte Decree, qualify ¶ XIII(c), thus vitiating the Court's retention of jurisdiction to evaluate the effect of the construction or threatened construction of any storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir?

4. Should the Court accept a recommended reading of ¶ X which generates contradictions and internal inconsistencies in the Decree which do not arise when ¶ X is given its plain meaning?

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PARTIES INVOLVED

This suit was commenced in 1934 by the State of Nebraska against the State of Wyoming. Following the denial of Wyoming's motion to dismiss, which was predicated on the indispensability of the State of Colorado and the United States of America, Colorado was impleaded as a defendant and the United States was granted leave to intervene. *Nebraska v. Wyoming*, 296 U.S. 553 (1935); *Nebraska v. Wyoming*, 304 U.S. 545 (1938). The Court entered its original Opinion and Decree in 1945. *Nebraska v. Wyoming*, 325 U.S. 589 (1945);[1] *Nebraska v. Wyoming*, 326 U.S. 683 (1945).

On October 7, 1986, Nebraska filed her motion for leave to reopen the case, seeking relief solely against Wyoming. (Docket No. 1).[2] The motion was granted on January 20, 1987. *Nebraska v. Wyoming*, 479 U.S. 1051 (1987) (Docket No. 4a). Colorado and the United States have participated in the same capacities as in the initial proceedings. Relief is also sought against Wyoming and the United States in Nebraska's motion for leave to amend her petition dated October 9, 1991. (Docket No. 407). Consideration of the motion to amend was deferred by the Court's Order of May 18, 1992. *Nebraska v. Wyoming*, ____ U.S. ____, 112 S. Ct. 1930 (1992) (Docket No. 477).

Five entities sought to intervene in 1987, *viz.*, Basin Electric Power Cooperative ("Basin"), Central Nebraska Public Power and Irrigation District ("Central"), the Nebraska Public Power District ("NPPD"), the Platte River Whooping Crane Critical Habitat Maintenance Trust ("Trust"), and the National Audubon Society ("Audubon"). (Docket Nos. 7, 8, 14, 16). Special Master Olpin denied the motions to intervene, but allowed the active participation of the would-be intervenors as *amici*. *See* Owen Olpin, Special Master, First

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[1] *Nebraska v. Wyoming*, as used throughout this brief refers to the initial decision in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), unless otherwise indicated.

[2] By agreement of the parties and the Special Master, pleadings contained in the Special Master's Docket are identified by docket number in parentheses.

Interim Report (June 14, 1989) ("First Interim Report") (Docket No. 140).

On June 8, 1991, the Special Master invited the *amici* to re-petition to intervene. (Docket No. 366). Audubon, Central, and the Trust repetitioned. (Docket Nos. 382, 384, 387). Basin had a pending motion to reconsider the denial of its first motion for intervention. (Docket No. 120). Master Olpin recommended denial of all petitions in his Second Interim Report. *See* Owen Olpin, Special Master, Second Interim Report on Motions for Summary Judgment and Renewed Motions for Intervention (April 9, 1992) ("Second Interim Report") (Docket No. 463).

JURISDICTION

The State of Nebraska invoked the original jurisdiction of the Court under ¶ XIII of the Decree in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), *modified*, 345 U.S. 981 (1953). Paragraph XIII retained the Court's jurisdiction "for the purpose of any order, direction, or modification of the decree" to address future developments or "[a]ny change in conditions making modification . . . or the granting of further relief necessary or appropriate."[3] 325 U.S. at 671-72. The Decree was entered under Article III, Section 2, Clause 2, of the United States Constitution and the Judiciary Act, 28 U.S.C. § 1251(a) (1988).

The petition to reopen requested enforcement of "the provisions of its Decree," as well as injunctive relief "enjoining . . . Wyoming from increasing its depletion of the natural flows of the North Platte River in violation of . . . Nebraska's apportionment under the Decree." Nebraska's Petition at 1, 3-4 (Docket No. 1).[4] Nebraska seeks to

[3]As used in this brief, the "Decree" refers to the 1945 decree, 325 U.S. 665, as modified by the Court's order in 1953, 345 U.S. 981.

[4]Nebraska's Motion for Leave to File Petition for an Order Enforcing Decree and for Injunctive Relief, Petition for an Order Enforcing Decree and for *(cont'd.)*

construe or clarify the Decree, to modify it as necessary by the addition of appropriate provisions, and to enforce it. *See* 325 U.S. at 671-72.

Nebraska v. Wyoming was initially docketed as No. 6, Original. When the case was reopened on January 20, 1987, it was redocketed as No. 108, Original. *Nebraska v. Wyoming*, 479 U.S. 1051 (1987) (Docket No. 4a). On June 22, 1987, the Court appointed the Honorable Owen Olpin as Special Master. (Docket No. 20a).

On September 11, 1987, Wyoming filed a motion for summary judgment seeking to dispose of the case in its entirety, except for her counterclaim. (Docket No. 23). Master Olpin denied the motion in his First Interim Report on June 14, 1989. (Docket No. 140).

In February and March, 1991, Colorado, Nebraska, Wyoming and the United States filed cross-motions for summary judgment, with Colorado and Wyoming generally aligned against Nebraska and the United States. (Docket Nos. 292, 294, 296, and 297). Master Olpin's recommended disposition of the cross-motions is contained in his Second Interim Report of April 9, 1992. (Docket No. 463).

Pursuant to the Court's Order of May 18, 1992, the parties were granted forty-five days to file exceptions to the first and second interim reports. *Nebraska v. Wyoming*, ___ U.S. ___, 112 S. Ct. 1930 (1992) (Docket No. 477).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case does not directly involve specific constitutional or statutory provisions. The North Platte River Decree is reprinted in the Appendix. *See* Appendix at A-1-15.

Injunctive Relief, and Brief in Support of Motion for Leave to File Petition for an Order Enforcing Decree and for Injunctive Relief (Oct. 8, 1986) (Docket No. 1).

STATEMENT OF THE CASE

Equitable apportionment is the body of federal common law which governs disputes among states over their rights *parens patriae* to the use of the waters of an interstate stream. In this case, each of the party states adheres intrastate to the doctrine of prior appropriation, which is predicated on the climatological fact that demand will inevitably exceed the supply. Priority of appropriation thus posits the principle that the first appropriator in time is the first in right and that each senior water right is to be satisfied in full before water is allowed to flow to successively junior users. Individual regimes of state water law, however, are not tailored to conflicting claims on an interstate stream. Based on the jurisprudence of equitable apportionment in 1934, Nebraska filed this suit against Wyoming to extend the concept of priority of appropriation across the state line, which, according to a contemporaneous decision, afforded "the only basis . . . consonant with the principles of right and equity applicable to such a controversy . . .." *Wyoming v. Colorado*, 259 U.S. 419, 470 (1922).[5]

The North Platte River is a non-navigable interstate stream flowing wholly within the states of Colorado, Wyoming, and Nebraska. It rises in the mountains of northern Colorado and flows northerly to the vicinity of Casper, Wyoming, where it turns to the east and proceeds in a southeasterly direction through Wyoming and into Nebraska. Its principal tributary below Pathfinder Reservoir — the Laramie River — also rises in the mountains of northern Colorado and flows northerly to Wheatland Reservoir in Wyoming, where it turns to the northeast and flows to its confluence with the North Platte River between the Whalen Diversion Dam and the Tri-State Diversion Dam. *See* Appendix at A-16.

Pursuant to the Reclamation Act of 1902, a large reclamation project had been constructed along the North Platte in the early 1900s, *viz.*, the North Platte Project, serving lands in Wyoming and

[5]*Wyoming v. Colorado* as used throughout this brief refers to *Wyoming v. Colorado*, 259 U.S. 419 (1922), unless otherwise indicated.

Nebraska. Another large federal project under construction when the North Platte Decree was entered in 1945 was the Kendrick Project, which serves lands in Wyoming. Five major reservoirs are associated with these projects. Pathfinder, Guernsey and Glendo reservoirs store water for the North Platte Project, and Seminoe and Alcova reservoirs store water for the Kendrick Project.[6] Releases from each of the principal reservoirs generate hydroelectric power. The stored water is normally released for irrigation in middle to late summer.

Nebraska v. Wyoming was precipitated by the beginning of a decade of drought in 1931 and the initial construction of the Kendrick project in Wyoming. 325 U.S. at 599. The North Platte River had long been over-appropriated when the suit was filed. Doherty Report at 7; 325 U.S. at 608. Essentially all of the surface water of the North Platte was used for irrigation when this suit was filed. In some reaches of the mainstem and the tributaries, the demand exceeded the supply; in other reaches, the supply exceeded the demand. Overall, there was not enough water to satisfy the irrigation season requirements in the three states.

Dealing only with the natural flows of the system and limiting the allocation of the supply to agricultural needs during the irrigation season, *i.e.*, May 1 to September 30 of each year, the object of the parties and Special Master Doherty was to protect existing uses to the extent possible and to ascertain and allocate the supply to meet the demand in the various reaches of the river. While the parties took differing conceptual approaches to the apportionment, all were agreed that the supply had to be determined in each reach in order to meet the progressive downstream demands. *See generally* Doherty Report at 99-101. *See also, e.g.*, Nebraska Exhibit Nos. 10, 11, 85, 86, 302, 431; Wyoming Exhibit Nos. 80, 81, 86-98, 112, 146, 150, 151, 170,

[6]Smaller reservoirs include Kortes, Gray Reef, Lake Alice, Lake Minatare, Little Lake Alice, and Lake Winters Creek. The latter four are located off-channel in Nebraska and are collectively referred to as the Inland Lakes.

173, 177, 180; United States Exhibit Nos. 116, 117, 125, 136, 143, 271; Engineers' Stipulation — May, 1942.

For the purpose of analyzing supply and demand, the North Platte River falls into several natural sections. The evidence at trial dealt with the sectional requirements, supplies, and allocations in six reaches of the North Platte River: 1) North Park, Colorado; 2) the Colorado-Wyoming state line to Pathfinder Reservoir; 3) Pathfinder Reservoir to Whalen, Wyoming; 4) Whalen to Tri-State Dam, Nebraska; 5) Tri-State Dam to Kingsley Reservoir; and 6) Kingsley Dam to Grand Island. Doherty Report at 7; 325 U.S. at 593; *see also* Appendix at A-16. Master Doherty determined the water supplies and irrigation demands in each section of the North Platte River and reached conclusions about the equitable distribution in each section, weighing the competing demands in successive downstream reaches.

In section one, the Special Master found that accretions to the river averaged 635,100 acre feet per year and that Colorado was consuming 104,540 acre feet annually. Doherty Report at 21, 125; 325 U.S. at 593 n.3, 600. Though Colorado had a large share of junior appropriators compared to Wyoming and Nebraska, Master Doherty determined that Colorado had not exceeded her equitable share of the North Platte River. Doherty Report at 125-27; 325 U.S. 621-23. Because the water supply in the remainder of the river basin was insufficient to meet the demands of downstream senior water users, however, the Master determined that any additional consumption by junior appropriators in North Park would be inequitable *vis-a-vis* established downstream uses. Accordingly, he limited future depletions of the North Platte River in Colorado. Doherty Report at 177; 325 U.S. at 665 (Decree ¶ I).

In section two, from the Colorado-Wyoming state line to Pathfinder Reservoir, the Master reached the same conclusion. Doherty stated that "no additional burden can be placed on the supply without encroachment on present rightful uses, and therefore [I] propose that present uses as defined should be set as the measure of Wyoming's equitable share in respect to this section." Doherty

Report at 136. The average annual accretion from this section of the river was 1,059,240 acre feet, and consumption averaged 162,400 acre feet annually. *Id.* at 22, 133-136; 325 U.S. at 593 n.3. Because of the over-appropriated condition of the river downstream, the Special Master limited Wyoming to existing water uses on the tributaries above Pathfinder Reservoir. Doherty Report at 177; 325 U.S. at 665-66 (Decree ¶ II).

In section three, Pathfinder Reservoir to Whalen Dam, the accretions were determined to be 390,000 acre feet annually.[7] Doherty Report at 22; 325 U.S. at 593 n.3. The Master found that Wyoming's irrigated acreage on the mainstem, 14,000 acres, consumed 19,500 acre feet of water annually. Doherty Report at 146; *see also* 325 U.S. at 603. He determined that restrictions should be placed on diversions from the mainstem of the river, but that limitations were not necessary on the tributaries because there was no threat of development. Doherty Report at 145-48, 177; 325 U.S. at 624-25, 665-66 (Decree ¶ II).

Section four, the Whalen to Tri-State reach, is "the pivotal reach" of the North Platte River. 325 U.S. at 604. Concentrated in this 43-mile span of the river is a demand as great as in the preceding 415 miles. Doherty Report at 53; 325 U.S. at 596, 604. During the 1931-1940 drought period, the accretions of natural flow in this section were found by the Master to be 86,450 acre feet annually, including the contributions of the Laramie River. Doherty Report at 67 (Table III). By contrast, the requirements for irrigated lands were 1,072,514 acre feet. *Id.* at 59 (Table II). To meet the diversion requirements in this section of the river, Master Doherty recognized the need to

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[7] Most of the federal storage reservoirs are located in this section of the river. In apportioning the North Platte, the Court distinguished between storage water and natural flows, apportioning only the latter. Storage was "left for distribution in accordance with the contracts which govern it." 325 U.S. at 631. The storage water and natural flows have been segregated on a daily basis for administrative purposes since the Decree was entered in 1945.

assure that significant flows entered the reach from upstream sources. He therefore restricted upstream uses where there was a threat of further development. Over the period 1931-1940, which formed the basis of the Master's and the Court's determinations of sectional accretions between Whalen and Tri-State, the upstream inflow to reach four averaged 972,195 acre feet annually. Doherty Report at 67 (Table III). To meet the irrigation requirements, the Master compiled a table of the inflow at Whalen, the contribution of the Laramie, and the other accretions in the reach to arrive at an average annual supply — consisting of storage water and natural flow — of 1,058,645 acre feet.[8] *Id.* It was this average amount of water, minus its storage component, that Master Doherty recommended be apportioned between Wyoming and Nebraska in reach four.[9] *See id.*

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[8]Table III was based on the Engineers' Stipulation and Wyoming Exhibit Nos. 148 and 173. The figures reflecting the contribution of the Laramie River during 1931-1940, as shown in column 2, Table III, were taken from Wyoming Exhibit No. 173. Wyoming described these inflows as the minimum amount of "usable accretions" that should be included in the apportionment of the natural flows in the Whalen/Tri-State reach. *See, e.g.*, Brief of Defendant, State of Wyoming (Jan. 29, 1945) at 41, 62. Wyoming Exhibit No. 170 showed that the average historical runoff of the Laramie at its mouth 1904-1940 was 132,000 acre feet. Wyoming's principal expert witness, Mr. E. K. Nelson, "reconstructed" the historical average to account for the additional development and depletion of Laramie waters as of 1938. *See* Wyoming Exhibit No. 173. Based on Wyoming Exhibit No. 173, Nelson testified that 85,000 acre feet annually (35,500 acre feet during the irrigation season) would be available for "future . . . downstream use." Brief of State of Wyoming, Defendant (Sept. 5, 1942) at 142. Accordingly, Wyoming's position before Master Doherty was that her "[c]onclusion with reference to the Laramie river is that the decree [in *Wyoming v. Colorado*] should not be disturbed and that its future contribution to the North Platte supply will be as outlined by Nelson." *Id.*

[9]Nebraska initially sought an equitable apportionment extending to Grand Island, Nebraska. Ultimately, Nebraska withdrew its claim for direct diversions below Bridgeport based on the recognition that the return flows from the North Platte Project and the construction of Kingsley Dam would satisfy the downstream requirements. 325 U.S. at 607. Approximately 50% of the water diverted for irrigation is actually consumed by evapotranspiration. The remaining 50% returns *(cont'd.)*

at 71 (Table IV) (segregating storage); 325 U.S. at 667 (Decree ¶ V).

During the proceedings before Master Doherty, Wyoming sought a "mass allocation" of the available supplies, *i.e.*, the allocation of a quantum of water to each state, to be distributed intrastate as each state saw fit. By the time the case came before the Court, Wyoming believed that the Master had made "an acceptable form of mass allocation" with respect to "all sections of the stream except the Whalen-Tri-State section and the Kendrick Project." Brief of Defendant, State of Wyoming (Jan. 29, 1945) at 36. Based on the total requirement of 1,027,000 acre feet in the Whalen to Tri-State reach, Wyoming sought a mass allocation of 790,000 acre feet annually to Nebraska and 237,000 acre feet to herself.[10] *Id.* at 37. Because of the significant shortages of natural flow in the Whalen to Tri-State reach, including upstream contributions, the Master determined that it would be most equitable to apportion the natural flow in this interstate reach of the river 75% to Nebraska and 25% to Wyoming.[11] Doherty Report at 67 (Table III), 71 (Table IV), 148-162. The apportionment recommended by Special Master Doherty was adopted by the Court. *See, e.g.*, 325 U.S. at 620-21, 626-27, 638-46. After considering each of the proposed alternatives, the Court held "that the flat percentage method recommended by the Special Master is the most equitable method of apportionment." *Id.* at 646.

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to the regimen of the river by surface returns, ground water drains, and accretions through ground water percolation.

[10]Wyoming subtracted out of the total irrigation season requirements in the Whalen to Tri-State reach — 1,072,514 — 46,000 acre feet which the Master determined would be allocated to the Inland Lakes during the non-irrigation season in order to reduce the irrigation season demand in this reach.

[11]The Court denied Wyoming's request for a mass allocation in this reach because Wyoming did not convince the Court "that [she had] shown an adequate supply to justify the allocation she [sought]." 325 U.S. at 626. The Court also rejected the alternatives proposed by the other parties.

As noted above, the Special Master determined that the dependable accretions in the Whalen/Tri-State reach were 86,450 acre feet annually. Doherty Report at 67 (Table III). In making that determination, Master Doherty relied on Wyoming Exhibit Nos. 148 and 173. Wyoming, however, had made a mistake in Exhibit No. 148, inadvertently omitting the return flows from Spring Creek to the surface supply in the Whalen/Tri-State reach. The omission was corrected in Wyoming Exhibit No. 150, adding 2,855 acre feet annually to be apportioned in the pivotal reach. After being apprised of the omission by Wyoming, the Court adjusted Table III of Doherty's Report to account for the additional 2,855 acre feet that "should be taken into account in computing Nebraska's requirement of water from Wyoming." 325 U.S. at 648. To make this aspect of the apportionment explicit, the Court added the phrase "including the contribution of Spring Creek" to the apportionment in ¶ V of the natural flows in the Whalen/Tri-State reach, 75% to Nebraska and 25% to Wyoming.[12] *See* 325 U.S. 667 (Decree ¶ V).

Since the Decree was entered in 1945, the states of Wyoming and Nebraska and the Bureau of Reclamation have agreed on a daily computation of the natural flow available for allocation in the Whalen/Tri-State reach pursuant to the Decree. In the computation, the Wyoming "tributary flow" is the sum of all tributary flows to the North Platte from Whalen, Wyoming, to the state line, including the Laramie River. The Laramie River flows are measured near its mouth and tabulated on a daily basis. The annual contribution of the

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[12]The Spring Creek returns of 2,855 acre feet, rounded to 2,900 acre feet, were added to the average of 63,220 acre feet, appearing in Table III at the bottom of column 3 (63,220 + 2,900 = 66,120). When added to the remaining accretions, including the Laramie inflows of 23,230 acre feet in the reach, the Spring Creek returns to the reach amounted to 3% of the apportioned accretions in the reach. The minimum Laramie inflows, which were correctly compiled in Wyoming Exhibit No. 173 and were incorporated in Table III of Doherty report, amounted to 26% of the apportioned accretions in the reach.

Laramie to the natural flow has ranged from 6% to 31%. The Laramie River flows have been included as the most significant part of the "total Wyoming tributary inflows" and have been subject to the 75%/25% apportionment in ¶ V of the Decree since 1945.

When the suit was reopened in 1986, Nebraska was concerned that Wyoming would deplete the flows of the Laramie River that had been apportioned in ¶ V. While Wyoming has taken the position that she is entitled to deplete the Laramie River in its entirety, Nebraska was specifically concerned with two projects, *viz.*, Grayrocks Reservoir and the Corn Creek Project.

Situated on the Laramie River below Wheatland Reservoir, Grayrocks Reservoir was designed to provide water for cooling a coal-fired electric power generating plant. Prior to its construction in the late 1970s, it was understood that the operation of the reservoir could reduce the flows of the North Platte River and interfere with the apportionment to the State of Nebraska. The State of Nebraska, joined by the National Wildlife Federation and others, filed suit under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370b (1988 & Supp. 1989), and the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988 & Supp. 1989), to ensure compliance with federal law and to protect the apportioned flows of the North Platte. The suit sought to enjoin the construction of Grayrocks because it would have adversely affected the critical habitat of whooping cranes downstream in Nebraska. *See Nebraska v. Rural Electrification Administration*, 12 E.R.C. 1156 (1978), *appeal dismissed*, 594 F.2d 870 (8th Cir. 1979). Enjoining the construction of Grayrocks would have protected critical wildlife habitat, hydropower production, irrigation, and recreational interests in Nebraska, as well as the apportionment in ¶ V during the irrigation season.

Nebraska prevailed in *Nebraska v. Rural Electrification Administration*, and the case was appealed to the Eighth Circuit. 594 F.2d 870 (8th Cir. 1979). The case was settled on appeal by the Agreement of Settlement and Compromise dated December 4, 1978 ("Settlement Agreement"). The Settlement Agreement restricted the use of Lara-

mie River water, created a trust fund to enhance the whooping cranes' critical habitat, and provided for minimum instream flows in the Laramie. Additionally, Nebraska's apportionment was protected. The State of Wyoming, however, was not a party to the litigation, the Settlement Agreement, or the stipulation of February 20, 1979, which resulted in the Eighth Circuit's order dismissing the case and vacating the district court's judgment enjoining construction of the dam. Accordingly, Wyoming has refused to honor the Settlement Agreement or the stipulation.

In the Settlement Agreement, Nebraska agreed to the construction of Grayrocks Reservoir in exchange for certain water consumption limitations by the Grayrocks power plant, guaranteed releases during both the irrigation and the non-irrigation seasons, and an additional supply of electricity for use in Nebraska. Since the entry of the Settlement Agreement, however, Wyoming has threatened to administer the Laramie River contrary to the operation of Grayrocks, as set forth in the Settlement Agreement, to allow further development to dewater the Laramie at or near its confluence with the North Platte River.

In order to facilitate the administration of the North Platte Decree, annual "Natural Flow" meetings are attended by the representatives of states of Wyoming and Nebraska and the Bureau of Reclamation. Since the meeting on May 14, 1979, the State of Wyoming has made it clear that because she was not a party to the Grayrocks Settlement Agreement any water released from Grayrocks Reservoir to meet the terms of the agreement would be subject to diversion by water users in Wyoming. In other words, the State of Wyoming threatens not to preserve the tributary inflows from the Laramie that were apportioned in ¶ V of the Decree, which Nebraska sought to preserve in *Nebraska v. Rural Electrification Administration*. On the contrary, Wyoming has asserted the right to completely dewater the Laramie at its mouth.

Another threat which precipitated reopening the suit in 1986 was the threat to authorize diversions from the Laramie River for the

proposed Corn Creek Project. The Corn Creek Irrigation District is situated in Goshen County, Wyoming and extends south of the confluence of the Laramie and North Platte rivers. The District, which has not developed its irrigation facilities, encompasses approximately 70,000 acres. On July 24, 1974, the District's predecessor contracted with the Basin Electric Power Cooperative on behalf of the Missouri Basin Power Project for the future delivery of 22,500 acre feet annually from Grayrocks Reservoir. Additional water supplies needed by the District would come from new depletions of the natural flows of the Laramie and North Platte rivers. The proposed project consists of a surface water diversion system, a large capacity pump station at the confluence of the Laramie and North Platte rivers, a storage reservoir, and a pipeline distribution system. By admission of the State of Wyoming at oral argument on March 9, 1992, Corn Creek "is an active vital project" and thus remains an imminent threat to Nebraska. Transcript of Hearing at 72 (Docket No. 435).

Aside from the facts bearing on the threat to the apportionment of the Laramie River inflows to the North Platte River in ¶ V of the Decree, the proposed construction of tributary storage in Wyoming threatens to undermine the Decree's apportionment. When the suit was reopened in 1986, Nebraska was concerned with the proposed Deer Creek Project near Casper, Wyoming. The proposed project raises an issue left unresolved by the Court in 1945. In ¶ XIII(c) of the Decree, the Court expressly retained jurisdiction to address "[t]he question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir. . .."[13] 325 U.S. at 672. Deer Creek is the second

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[13]At the close of the evidence, the United States insisted that regulation of the tributaries between Pathfinder and Guernsey reservoirs was essential because the possibility of future storage on the tributaries could deplete tributary inflows to the *(cont'd.)*

tributary east of Casper in the section between Pathfinder and Guernsey. The proposed Deer Creek Project is a large scale multi-purpose project for municipal, industrial, agricultural, recreational, and hydropower uses. An assessment of the hydrological effects of the Project falls under ¶ XIII(c).

In addition to ¶ XIII(c), the threatened construction of the Deer Creek Project has implicated ¶ X of the Decree. Paragraph X is a single sentence providing that "[t]his decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption." 325 U.S. at 670. The purpose of ¶ X was to assure that the apportionment provisions for irrigation in the Decree did not adversely affect or restrict municipal uses pursuant to Colorado or Wyoming law.

SUMMARY OF ARGUMENT

A. Laramie River Inflows

While the Special Master has recognized that Nebraska has an entitlement to the continued inflows of the Laramie River to the North Platte River, he stopped short of concluding that the inflows were apportioned to Nebraska in ¶ V of the Decree. Failing to address the evidence which demonstrates that the inflows were

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North Platte available for storage in Guernsey Reservoir and the Inland Lakes. 325 U.S. at 624-625. The only existing tributary storage was LaPrele Reservoir with a capacity of 20,000 acre feet, the effects of which had been unaddressed. Because Master Doherty had concluded that the evidence showed no need to limit tributary storage in 1945, the Court found "no evidence of any present threat to the water supply from this source." *Id.* at 625. Accordingly, the Court concluded that "[i]f such threat appears and it promises to disturb the delicate balance of the river, application may be made at the foot of the decree for an appropriate restriction." *Id.*

actually apportioned, the Master mischaracterizes Nebraska's position as an assertion of an "implicit" apportionment.

Contrary to Wyoming's current argument that every drop of the Laramie River was apportioned in *Wyoming v. Colorado*, the Court allocated the supply between Colorado and Wyoming in that case down to the diversion for the Wheatland Project in Wyoming. The water below Wheatland was not at issue in *Wyoming v. Colorado*, including water passing the Wheatland diversion, return flows below the project, and accretions to the river on the mainstem and from tributaries between Wheatland and the mouth of the Laramie. In *Nebraska v. Wyoming*, Wyoming acknowledged that the Court did not consider the supply below Wheatland in *Wyoming v. Colorado*. Wyoming also analyzed the recorded Laramie inflows to the North Platte River and urged that the Court treat the inflows as a continuing source of supply to satisfy irrigation demands in Nebraska.

A review of Master Doherty's report facilitates an understanding of the Court's treatment of the Laramie River in *Nebraska v. Wyoming*. Doherty noted that the bulk of the irrigation demand along the North Platte is in the Whalen/Tri-State reach of the river, one of four reaches analyzed in relation to one another in an attempt to satisfy all of the irrigation demands. After preserving the inflows to successive downstream reaches by restricting uses in the upstream reaches or concluding that there was no threat of future development in the upstream reaches, Master Doherty added the inflows at Whalen to the net accretions in the Whalen/Tri-State reach to arrive at an apportionment fund. Rejecting the apportionment theories advanced by each of the parties because of the shortage of supply to demand in the lower reach, Master Doherty recommended that the natural flow in the reach be apportioned 75% to Nebraska and 25% to Wyoming. The Laramie inflows were an express and integral part of the apportionment fund set forth by Master Doherty in column 2 of Table III of his report and apportioned 75%/25% by the Court.

In compiling the apportionment fund in Table III for the water-short reach, Master Doherty relied on Wyoming exhibits, one of

which reproduced the Laramie River inflows to the reach and one of which calculated the net accretions in the reach. On exceptions to the Court in 1945, Wyoming alerted the Court to an error in the latter exhibit, *viz.*, the omission of the contribution of Spring Creek to the apportionment fund which Master Doherty recommended be distributed 75%/25% in ¶ V of the Decree. As a result, the Court added the phrase "including the contribution of Spring Creek" to ¶ V of the Decree. 325 U.S. at 667. The Spring Creek contribution amounted to 3% of the apportioned accretions in the reach. The Laramie inflows, which had not been omitted from the apportionment fund in Table III, amounted to 26% of the apportioned accretions. The fact that the Court bent over backwards to expressly include 3% of the apportioned supply underscores the prior inclusion of 26% of the apportioned supply.

The record before Special Master Olpin raises no genuine issue of material fact. The apportionment of the Laramie inflows is not debatable. Accordingly, the Court should modify the Master's recommendations to reflect that 75% of the Laramie inflows was expressly apportioned to Nebraska in 1945.

B. Paragraphs X and XIII(c)

Paragraph X of the Decree states:

> This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado and Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption.

325 U.S. at 670. Stated simply, ¶ X provides that "[t]his decree shall not affect or restrict municipal uses."

Instead of giving ¶ X its plain and unambiguous meaning, Master Olpin construes ¶ X as an affirmative grant to municipalities of an unqualified right to deplete the natural flows of the North Platte. Master Olpin changes the words "[t]his decree shall not affect or restrict municipal uses" to mean "municipal uses can affect or

restrict the apportionment set forth in the provisions of the Decree." By changing the syntax of the sentence, Master Olpin inexplicably inverts the subject and object of ¶ X, replacing "decree" with "municipal uses," and simultaneously changes the predicate of the sentence from a negative term ("shall not affect or restrict") to a positive term ("can affect or restrict"). The Master's reading of ¶ X is exactly the same as equating "dogs cannot hurt cats" with "cats can hurt dogs." To arrive at his "plain meaning," Master Olpin makes two violent changes in the syntax of the sentence, creating a "municipal exemption."

Master Olpin states that "[t]here is little to be found in the Record of the original proceedings on the origin or nature and scope of the paragraph X municipal exemption." Second Interim Report at 78 (Docket No. 463). The record shows, however, that all of the parties, Master Doherty, and the Court intended ¶ X to prevent the provisions applicable to the irrigation apportionment in the Decree from interfering with municipal diversions and uses. *See* Doherty Report at 180.

As a result of his incorrect reading of ¶ X, Master Olpin reads ¶ XIII(c), in which the Court retained jurisdiction to address an unresolved issue, as a substantive provision of the Decree subordinated by the "municipal exemption." A provision in a decree which mandates that the decree shall not affect or restrict something, *i.e.*, that the operative provisions of a decree shall in no way define, limit, constrain, or diminish something, refers only to those other provisions which have decided something and have the power to define, limit, constrain, or diminish something else. Such a provision does not refer to a provision which retains jurisdiction to determine something in the future. In reaching the conclusion that ¶ X both qualifies and vitiates the Court's retention of jurisdiction in ¶ XIII, Master Olpin has not only divined the outcome of a potential future exercise of the Court's jurisdiction, but has also tacitly construed ¶ XIII(c) as a provision which has decided something in a way which

has the power to define, limit, constrain, or diminish something else. Paragraph XIII(c), however, has decided nothing.

Finally, Master Olpin's revision of ¶ X creates numerous problems which he describes as "vexing questions," "complex issues," and "mysteries," including conflicts which result from his construction of ¶ X and the provisions of ¶¶ XII(a) and XIII(f). He also discerns contradictions between the 'strenuous battle over 2,[9]00 acre feet' in 1945 and his view that ¶ X gives municipalities the unqualified right to deplete the apportioned flows. The proposed Deer Creek Project, for example, would impound 9,600 acre feet of apportioned natural flows on an average annual basis. The Master does not understand, however, that the contradictions and other problems he discerns are of his own making. *i.e.*, that they result from his distorted reading of ¶ X.

ARGUMENT

POINT I

THE COURT DID NOT EXPRESSLY ADD 3% OF THE APPORTIONED ACCRETIONS WHICH HAD BEEN INADVERTENTLY OMITTED IN THE WHALEN/TRI-STATE REACH WITHOUT NECESSARILY ACKNOWLEDGING THE PRIOR INCLUSION OF 26% OF THE APPORTIONED ACCRETIONS

In her motion for partial summary judgment, Nebraska sought a declaration that the inflows of the Laramie River to the North Platte River were apportioned 75% to Nebraska and 25% to Wyoming in ¶ V of the Decree. *See* Nebraska's Motion for Partial Summary Judgment (Docket No. 296). In his Second Interim Report, Special Master Olpin concluded that "[n]othing in the Doherty Report [or] the Court's Opinion reflects any consideration, much less final resolution, of [the disposition of the Laramie inflows]." Second Interim Report at 47 (Docket No. 463). In the context of summary judgment, the Master's conclusion is tantamount to a finding that Nebraska has not

demonstrated the absence of a genuine issue of material fact, *i.e.*, has not established the underlying factual certainty requisite to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Accordingly, the Master further concluded that "Nebraska deduces that the Special Master and the Court *implicitly* apportioned to her the . . . Laramie flows." Second Interim Report at 53 (emphasis added) (Docket No. 463). Based on his conclusions, Master Olpin has declined to recognize that Nebraska's admitted entitlement to Laramie River inflows was part of the express apportionment in ¶ V.

Both of the Special Master's conclusions are flatly wrong. First, not only Master Doherty's report and the Court's opinion in *Nebraska v. Wyoming*, but also the express language of ¶ V of the Decree, reflect the consideration and resolution of the disposition of the Laramie inflows.[14] *See* 325 U.S. at 667. Second, Nebraska has not deduced an implicit apportionment. The apportionment of the Laramie inflows in ¶ V is express and unqualified. The error in Master Olpin's conclusions is explained by the way in which Master Doherty and the Court in 1945 arrived at "the total sectional natural flow fund," which was apportioned 75%/25% in ¶ V of the Decree, and how the phrase "including the contribution of Spring Creek" in ¶ V substantiates the express inclusion of the Laramie inflows in the apportioned fund of natural flow.

A. The Whalen/Tri-State Apportionment Fund

Special Master Olpin describes the cross-motions for summary judgment with respect to whether 75% of the inflows of the Laramie River was apportioned to Nebraska in ¶ V of the Decree as having their genesis in the "seeming contradiction" between the mathemati-

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[14]Master Olpin does not recite the evidence which bears on the apportionment of the Laramie inflows in either his First Interim Report or his Second Interim Report.

cal inclusion of those flows in the apportionment and ¶ XII(d) of the Decree, which provides that the Decree "shall not affect . . . "[t]he apportionment heretofore made [of the Laramie River in *Wyoming v. Colorado*, 259 U.S. 419 (1922)] . . . ." Second Interim Report at 44, 41-47 (Docket No. 463); 325 U.S. at 671. This "seeming contradiction" allows Wyoming to press its claim that "every drop of the Laramie" was fully apportioned in *Wyoming v. Colorado* in 1922 while Nebraska asserts the fact that the inflows of the Laramie were affirmatively apportioned as part of the natural flows described in ¶ V of the Decree in *Nebraska v. Wyoming*. *See* Second Interim Report at 44 n.62 (Docket No. 463). Once it is discerned, however, that the "seeming contradiction" is not a contradiction, it becomes equally clear that Wyoming's interpretation is untenable and that the apportionment of the Laramie inflows in ¶ V is unquestionable. Rather than being contradictory, the proposition that the Laramie Decree was "left undisturbed" and the fact that the Laramie inflows to the North Platte were apportioned to Nebraska in 1945 are entirely complementary.

In support of her view that every drop of the Laramie River was apportioned between Wyoming and Colorado in *Wyoming v. Colorado*, Wyoming has argued that the North Platte Decree expressly states that it shall not affect "[t]he apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River. . .." 325 U.S. at 671 (Decree ¶ XII(d)). The Court's disposition of the Laramie inflows to the North Platte in ¶ V, however, does not contravene this provision of the Decree.

In *Wyoming v. Colorado*, Wyoming sought to enjoin Colorado's proposed diversions of water from the Laramie for future use. Wyoming introduced evidence to preserve a level of appropriation which was based on rights with priorities senior to proposed Colorado diversions. The Court quantified existing and proposed uses in both states and determined the available supply, concluding that the "entire supply available for the proposed Colorado appropriation and the Wyoming appropriations *down to and including the diversions for the Wheatland District* is 288,000 acre-feet."[15] 259 U.S. at 488 (emphasis added). The Court made no mention of the status of the Laramie waters between Wheatland and the confluence of the Laramie with the North Platte. The opinion did not address water passing the Wheatland diversion, the status of return flows below Wheatland, or accretions to the river on the mainstem and from tributaries between Wheatland and the mouth of the Laramie. The water below Wheatland was not at issue in *Wyoming v. Colorado*.[16]

After quantifying the available supply in *Wyoming v. Colorado*, the Court determined how to apportion it. The evidence shows that the amount allocated to Wyoming was based on defined irrigation requirements associated with particular lands. The Court declared:

> The evidence shows that the Wyoming appropriations having priorities senior to the one in Colorado, and which are dependent on the available supply before named, cover *181,500 acres of land and that the amount of water appropriated and reasonably required for the irrigation of these lands is 272,500 acre-feet*. . . .
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[15]The Wheatland Project has direct flow and storage rights with a priority of 1883 to irrigate 60,000 acres. It is located approximately two-thirds down river from the headwaters of the Laramie, about 50 miles upstream from the confluence with the North Platte. The ideal diversion is 135,000 acre feet, with a return flow of 56% or 75,600 acre feet. Major tributaries to the Laramie enter the river below the project lands.

[16]In her brief before Special Master Doherty, Wyoming prefaced her recommended apportionment to Nebraska of 35,500 acre feet of Laramie inflows during the irrigation season by stating that "[t]he Court did not consider supply or use below the Wheatland project [in *Wyoming v. Colorado*]." *See* Brief of State of Wyoming, Defendant (Sept. 5, 1942) at 138, Appendix at A-19. Master Doherty noted that Colorado, Wyoming, and the United States were of the view "that the Laramie is removed from the present case by the decree in *Wyoming v. Colorado*, except for such contribution as the Laramie may make to the North Platte after any use by Colorado and Wyoming permitted under the terms of that decree." Doherty Report at 270-71. Master Doherty ultimately adopted a figure of 23,230 acre feet — considerably less than proposed by Wyoming.

> As the available supply is 288,000 acre-feet and the amount covered by senior appropriations in Wyoming is 272,500 acre-feet, there remain 15,500 acre-feet which are subject to this junior appropriation in Colorado.

259 U.S. at 495-96 (emphasis added). The Court concluded its opinion by the issuance of an injunctive decree which limited the amount of water Colorado could divert from the Laramie for use in the Laramie-Poudre Project to 15,500 acre feet.[17] *Id.* at 496.

The Laramie Decree makes no mention whatsoever of Wyoming's asserted entitlement to "all the remaining" waters of the Laramie. The holding in *Wyoming v. Colorado* was confined to the evidence, which only embraced appropriations "down to and including diversions for the Wheatland District." *Id.* at 488. Accordingly, the preservation of the Laramie Decree in *Nebraska v. Wyoming* does not conflict with Master Doherty's recommendation and the Court's apportionment of the Laramie River inflows in the North Platte Decree.

In *Nebraska v. Wyoming* the depletions of and accretions to the natural flows of the North Platte River and its tributaries were analyzed by all of the parties, Master Doherty, and the Court by reaches of the river. In the upper reaches, the goal was to meet the existing demands in each reach without depleting the supplies entering successive reaches of the river. The Whalen/Tri-State reach differed from the upstream reaches because it was the last and most important reach, containing the bulk of the irrigation demands along the entire river and the least accretions of natural flows. The concern

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[17]Master Olpin has noted Wyoming's argument that the Court's adoption of the "dependable supply" formula in *Wyoming v. Colorado* recognized the over-appropriated condition of the Laramie River, thus leaving no water for Nebraska. *See* Second Interim Report at 45 (Docket No. 463). The over-appropriated condition of the Laramie, however, does not take away the return flows and accretions below Wheatland. Nor does it render void Wyoming's analysis in *Nebraska v. Wyoming* of the dependable inflows to the North Platte.

was to get enough water into the reach to meet the irrigation needs. While the object in the upper reaches had been to ensure outflows to meet downstream irrigation demands, the apportionment concept in the Whalen/Tri-State reach was to divert and use the entire supply entering the reach within its boundaries, allowing no more than nominal flows or necessary operational waste to continue downstream below Tri-State dam.

To the extent necessary, the Special Master restricted upstream activities to ensure sufficient inflows to the lower sections of the river. Doherty stated, however, that any regulation of the tributary diversions in the Pathfinder to Whalen apportionment would be of no real benefit to anyone. He felt that given the existing conditions, which included the physical nature of the flows in the area, economic considerations, and the seniority of irrigation rights, there was little possibility for future projects of any nature in that section.[18] Doherty Report at 147.

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[18]Wyoming has argued that because the Decree imposed restrictions on other sections of the North Platte but placed no express limitations on Wyoming's use of the Laramie, the Court implicitly assigned to Wyoming an entitlement to all Laramie flows not previously allocated to Colorado. Wyoming ignores the actual treatment of upstream tributaries by the parties and in the Decree.

In the Pathfinder to Whalen reach, Special Master Doherty and the Court declined to apply restrictions on storage to the tributaries. Doherty Report at 145-46; 325 U.S. at 624-625. In response to the United States' concern that tributary projects similar to the LaPrele Project could deplete the supply for Guernsey and Inland Lakes reservoirs, the Court held that "[i]f such threat appears and it promises to disturb the delicate balance of the river, application may be made at the foot of the decree for an appropriate restriction." 325 U.S. at 625; *see also id.* at 671-72 (Decree ¶ XIII(e)).

Similarly, the Court determined that nothing more than a limitation on irrigated acreage was necessary for the mainstem above Guernsey and the tributaries above Pathfinder, citing the Special Master's conclusions that the practical difficulties of applying restrictions to individual irrigators on the tributaries above Pathfinder to reduce the amount of water used outweighed any slight benefit to downstream reaches. *Id.* at 624; *see* Doherty Report at 134-135.

Addressing the lower section of the river between Whalen and Tri-State Dam, the Master noted that he was dealing with a much more complicated reach: "[T]his section presents a special situation calling for special consideration and treatment." *Id.* at 148. Doherty stated that it was necessary to determine the available water supply "as accurately as possible for two purposes: first, to learn whether it is sufficient or insufficient to meet the requirements; second, to determine what volume of water there is for apportionment if it is to be apportioned." *Id.* at 61. Wyoming had argued that there was no shortage and therefore no need of apportionment. If it was to be apportioned, Wyoming urged that natural flow and storage be pooled and treated as a common fund. *Id.* After examining the evidence of supply based on both the long term mean and the drought period, Doherty emphasized that the supply could meet the demand "only if properly regulated and diversions are held to reasonable requirements." *Id.* at 68.

In Table III of his report, Doherty set forth the supply or volume of water which Wyoming, the United States, and Master Doherty thought was reliably available in the Whalen to Tri-State reach during the irrigation season. *Id.* at 67. The Laramie inflows were based on Wyoming's testimony. Their contribution, according to E. K. Nelson, Wyoming's principal expert, was conservatively 85,000 acre feet annually, 35,500 of which was available during the irrigation

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Finally, it never occurred to Master Doherty to restrict development on the Laramie because Wyoming had routed the contemporaneous development through the mean supply, 1904-1940, and had affirmatively urged the apportionment of the remaining inflows to the North Platte to Nebraska. The notion that the Court excluded the Laramie contributions from the Decree by imposing general limitations on some, though not all, of the upstream tributaries, but not on the Laramie River, misconstrues the Master's and the Court's efforts to simplify the regulation and apportionment of the waters in the various reaches of the North Platte.

season.[19] *See* Appendix at A-25. The total supply was reached by combining the supply above Whalen, as determined and stipulated by the parties' engineers, the Laramie River inflow, based on the "reconstructed" flows in Wyoming Exhibit No. 173 between 1904 and 1930 and the actual recorded flows during the decade 1931-1940, and the net accretions between Whalen and the state line, based on Wyoming's Exhibit No. 148, as modified by a United States exhibit which excluded unusable accretions.[20]

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[19]Master Olpin comments that "Nebraska does not address Master Doherty's failure to include the Laramie in the portions of his Report describing drainage and irrigation in the North Platte Basin." Second Interim Report at 46 (Docket No. 463). In this regard, Master Olpin overlooks the significance of the acceptance of the Laramie River Decree, which was "left undisturbed." Instead of revisiting the irrigation demands for the entire Laramie drainage, Master Doherty — as well as Wyoming — picked up where the Laramie Decree left off, *i.e.*, below Wheatland. The return flows and accretions below Wheatland were included in the Whalen/Tri-State "apportionment fund" at the urging of Wyoming. Summing up her own position, Wyoming stated: "[Our] [c]onclusion with reference to the Laramie river is that the decree should not be disturbed and that its future contribution to the North Platte supply will be as outlined by Nelson." Brief of State of Wyoming, Defendant (Sept. 5, 1942) at 142, Appendix at A-23; *see also* Appendix at A-24-32.

[20]Wyoming "reconstructed" the long-term mean, 1904-1940, by routing the development and new storage capacity as of 1938 through the mean flows. *Compare* Wyoming Exhibit No. 170 with Wyoming Exhibit No. 173; Appendix at A-35-36, A-37-39. Advocating that "the existing use of the Laramie within Wyoming should be left undisturbed," Wyoming thus reduced the recorded mean of 132,000 acre feet to 35,500 acre feet during the irrigation season. Appendix at A-23. The figure was reduced to 23,230 — the actual mean — during 1931-1940, because the use of 35,500 during that period would have inflated the actual supply. *See* testimony of E. K. Nelson, Record at 27554-27560, Appendix at A-24-32.

The accretions to the river of Spring Creek, amounting to 3% of the apportioned accretions in the reach, were inadvertently omitted from Wyoming Exhibit No. 148, Appendix at A-33. *See infra* at 27-32.

Table III shows the following flows:

ANALYSIS, REQUIREMENT, AND SUPPLY 1931-1940
WHALEN/TRI-STATE DAM SECTION

Year	Supply Above Whalen (1)	Laramie River Inflow (2)	Whalen State Line Usable Net Accretions (3)	Total Supply	Requirement	Excess or Deficiency
1931	1,074,600	16,700	49,000	1,140,300	1,027,000	113,300
1932	1,315,000	19,300	45,200	1,379,500	1,027,000	352,500
1933	1,379,000	35,700	77,400	1,492,100	1,027,000	465,100
1934	452,900	2,700	56,000	511,600	1,027,000	-515,400
1935	771,300	48,800	49,900	870,000	1,027,000	-157,000
1936	963,880	17,300	51,300	1,032,480	1,027,000	5,480
1937	1,153,750	37,800	60,800	1,252,350	1,027,000	225,350
1938	1,040,550	33,800	95,800	1,170,150	1,027,000	143,150
1939	994,150	9,300	89,600	1,093,050	1,027,000	66,050
1940	576,820	10,900	57,200	644,920	1,027,000	-382,080
Average	972,195	23,230	63,220	1,058,645	1,027,000	31,645

(1) Engineers Stipulation, p. 13.

(2) W-173.

(3) Total net sectional accretions from W-148, from which are deducted unusable accretions in the section from U.S.-271, Column 48.

Doherty Report at 67.

The tabulation reflected the seasonal supply from all sources, including storage releases. *Id.* In recommending the 75%/25% apportionment which was adopted by the Court in ¶ V of the Decree, however, Master Doherty recommended the apportionment only of natural flow. The segregation of storage water and natural flow appears in Table IV of his report. *Ibid.* at 71. Taking the inflows from the upper reach, Master Doherty added the "[u]sable net accretions between [Whalen] and [Tri-State] . . . to the natural flow found to have passed [Whalen] to make up *the total sectional natural flow fund.*" *Id.* at 70 (emphasis added).[21]

[21]There is no hydrologic difference between "Guernsey Reservoir" and "Whalen." The designations have been used interchangeably by Master Doherty, Master Olpin, and the Court.

In its opinion, the Court referred to the deficiencies in the natural flow fund in the Whalen/Tri-State reach using Master Doherty's calculations from Table III and Table IV, thus including the contributions from the Laramie River. In reciting these variations in supply, the Court expressly acknowledged that Master Doherty defined "natural flow" to mean "all water in the stream except that which comes from storage water releases." 325 U.S. at 604-605. This is the "fund" of natural flow that the Court apportioned 75% to Nebraska and 25% to Wyoming.[22] *See* 325 U.S. at 642.

B. Spring Creek

With the segregation of natural flow and storage water, Table III of Master Doherty's report sets forth the apportionment fund in the Whalen/Tri-State reach, expressly including the Laramie inflows in column 2. Doherty Report at 67. The Court affirmed the amount of supply for the section, including the Laramie contribution. 325 U.S. at 604 n.9, 605. While Special Master Olpin has repeatedly recognized that Nebraska was given an entitlement to the Laramie River inflows, he has declined to characterize the entitlement as part of the express apportionment in ¶ V.[23] Master Olpin was apprehensive about recommending what he mischaracterized as an "implied apportionment" because he did not appreciate the evidence which demonstrates that the apportionment was express.

[22]While Master Doherty recommended a 75%/25% apportionment of the sectional natural flow, Wyoming sought a "mass allocation" based on the sectional requirements. 325 U.S. at 638, 642. The Court held that "the inadequacy of the supply is too clear to permit adoption of Wyoming's formula." *Id.* at 642. Nebraska wanted to extend priority of appropriation across the state line. The United States pressed alternative proposals, *i.e.*, a strict priority apportionment and an allocation on a priority basis to each of seven blocks. *Id.* at 642-43. Colorado simply wanted the case dismissed. Contrary to the proposals of each of the parties, the Court adopted Master Doherty's recommendation.

[23]Second Interim Report at 17, 39-40, 43-44, 48, 51, 55, 58-59, 60, 64 (Docket No. 463).

The Court rewrote ¶ V to expressly add 2,855 acre feet in the accounting of net accretions between Whalen and Tri-State, which already expressly included the flows of the Laramie, *viz.*, 23,230 acre feet. Doherty Report at 67; 325 U.S. at 648. The express recognition of the contribution of Spring Creek in ¶ V of the Decree confirms the apportionment of the inflows of the Laramie River. Spring Creek is a north-bank return flow stream which flows in Wyoming, crosses the state line into Nebraska, and enters the North Platte River in Nebraska above Tri-State Dam. Its inflows to the North Platte average 2,855 acre feet during the irrigation season. The Laramie River is a south-bank tributary of the North Platte which has its confluence in Wyoming. Its irrigation season inflows average *eight times* the amount of Spring Creek's.

Paragraph V of the 1945 Decree states:

> The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, **including the contribution of Spring Creek**, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five percent to Nebraska ... .

325 U.S. at 667 (emphasis added). Immediately upon reading ¶ V, a question arises with respect to the express inclusion of Spring Creek's contribution to the 75%/25% apportionment in the Whalen to Tri-State reach. A mistake in Wyoming Exhibit No. 148, upon which column 3 of Table III was based, provides the answer.

The addition of the Spring Creek language arose out of the resulting omission in Master Doherty's calculation of the total amount of return flows contributing to the supply in the Whalen/Tri-State reach, *i.e.*, the Whalen/State Line Usable Net Accretions in column 3 of Table III of his report. *Ibid.* at 67. Because return flows from lands served by the Interstate Canal, are collected in drains and channels and physically return to the North Platte above Tri-State Dam, they were included in Master Doherty's calculation in Table

III, column 3, of Whalen/Tri-State waters, which he apportioned 75%/25%. His calculations were based on Wyoming Exhibit Nos. 86-95 and 148.[24] In Wyoming Exhibit No. 150, however, Wyoming determined that there was an additional contribution of 2,855 acre feet annually from Spring Creek, a "return flow stream" which collects returns from lands served by the Interstate Canal and enters the North Platte just above Tri-State Dam.

A footnote in Wyoming Exhibit No. 150 reads as follows:

> Due to incomplete record this Return Flow stream [Spring Creek], entering Nebraska from Wyoming a short distance north of the main gaging station on the North Platte River, was omitted from Wyoming Exs. 86 to 95 and from later exhibits [Wyoming Exhibit No. 148, in particular]. This run-off enters the river above the Tri-State Canal head gate. The amount of run-off is to be added to Return Flow between Whalen and the Nebraska Line. In the Return Flow between Nebr. Line and Bridgeport the amount of water would show up as a channel accretion in the flows in the exhibits and is not to be added thereto. The amount of run-off should also be added as the inflow from Wyoming to Nebraska at the State Line. It has not been added in the Exhibits.

See Appendix at A-34.

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[24]Wyoming Exhibit Nos. 86-95 consist of 10 four-page summaries of the "stream flows and canal diversions" between Whalen and the state line for the period 1929-1939. The tributaries included for each year are the Laramie River, Lingle Power Return Less Laramie River Diversion, and Rawhide Creek. The "return flows" listed are Cherry Creek and Katzer Drain. Spring Creek was omitted. The "canal wastes" consist of various creeks, draws, or drains, also delivering return flow.

In its ~~brief in~~ support of its exceptions to Doherty's Report, Wyoming pointed out:

> One source of additional supply above the Whalen-Tri-State Dam section has not heretofore been considered, nor [is it] mentioned in the Master's Report. Spring Creek, a tributary of the North Platte, enters the stream below the Wyoming-Nebraska state line and above the Tri-State dam. . . . From [Wyoming Exhibit No. 150] it appears that the average May-September contribution of this stream was 2,855 acre feet. A number of unusually dry years are included in this period and we think it safe to use a round figure value of 2,900 acre feet. Taking this supply into account, together with the accretions between Alcova and the state line, there is a total of 230,350 acre feet which, for conveniences, we will assign as 230,000. Therefore, of the 1,027,000 acre feet required in the May-September period in the Whalen-Tri-State Dam section, 230,000 is available from sources below Alcova. Consequently, under average conditions prevailing in the 1904 to 1940 period, excepting only that we have used for accretions below Whalen and contribution of the Laramie River drought decade values of 1931 to 1940 as taken from Table III, page 67 of the Master's Report, 230,000 acre feet may be supplied below Alcova, leaving the required release at Alcova [of] 797,000 acre feet.

Brief of Defendant, State of Wyoming (Jan. 29, 1945) at 62-63, Appendix at A-41-42.

In its decision, the Supreme Court agreed with Wyoming, noting that the Master had failed to account for the accretions from Spring Creek, and concluding that "this accretion should be taken into account in computing Nebraska's requirement of water from Wyoming." 325 U.S. at 648. Accordingly, the language "including the contribution of Spring Creek" was added to ¶ V of the Decree. The Spring Creek addition was an amount above the net accretions shown in Table III. The Court would not have expressly included the Spring

Creek inflows (3% of the supply), which Doherty inadvertently left out because of an omission in Wyoming Exhibit No. 148, and have simultaneously excluded the Laramie (26% of the supply), which Doherty had expressly included. In other words, the fact that the Court bent over backwards to expressly include 3% of the apportioned supply proves that the Court necessarily recognized the prior inclusion of the Laramie inflows, *i.e.*, 26% of the apportioned supply.

Master Olpin's implied exclusion of the Laramie from the ¶ V apportionment contradicts the purpose of the express inclusion of Spring Creek. While ¶ V does not say, "including the inflows of the Laramie," to have done so would have been redundant of their express inclusion in Table III and would have required the listing of all other tributaries in the section as well. Additionally, the Court did not expressly mention the Laramie River in ¶ V for the simple reason that Master Doherty did not omit the Laramie inflows as he had done with respect to the Spring Creek inflows.

The Court's inclusion of the comparatively insignificant Spring Creek inflows in order to ensure that all sources of supply were included in the apportionment fund in the Whalen/Tri-State reach, makes it patently clear that the more important Laramie inflows had been previously included.[25] Ironically, Master Olpin's mischaracterization of Nebraska's position as an assertion of an "implied apportionment" results from his mistaken inference that the Laramie inflows were not apportioned because the phrase "including the

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[25] If Master Doherty did not recommend the apportionment of the Laramie inflows and the Court did not apportion those flows, ¶ V would have read:

> The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, but excluding the contribution of the Laramie River, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five percent to Wyoming and seventy-five percent to Nebraska . . ..

The phrase "excluding the contribution of the Laramie River" was obviously not added because the Court had no intention of gutting the apportionment.

" contribution of the Laramie River" was not added to ¶ V of the Decree. The problem lies in Master Olpin's failure to recognize that the Laramie River had already been accounted within the apportioned natural flow fund before ¶ V was amended.

Nebraska has fully satisfied her burden for obtaining summary judgement. There are no outstanding factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The record unequivocally demonstrates that 75% of the flows of the Laramie was expressly apportioned to Nebraska.

POINT II

THE PLAIN MEANING OF ¶ X OF THE DECREE CANNOT BE GLEANED FROM A READING WHICH INVERTS THE SUBJECT AND OBJECT OF THE SENTENCE AND UPENDS ITS SYNTAX, RESULTING IN THE VITIATION OF THE COURT'S RETENTION OF JURISDICTION IN ¶ XIII(C)

Nebraska takes exception to the Special Master's conclusion that ¶ X of the Decree provides a "municipal exemption" which gives municipal water users a right to deplete the apportionment of irrigation season flows of the North Platte River and to his related conclusion that the Court cannot exercise its retained jurisdiction pursuant to ¶ XIII(c) to address the effect of "the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir . . .." 325 U.S. at 672; *see* Second Interim Report at 77-83 (Docket No. 463). Both exceptions relate to Master Olpin's consideration of the proposed Deer Creek Project in Wyoming.

Deer Creek is a tributary "entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir," approximately 21

miles downstream from the City of Casper. 325 U.S. at 672. The proposed Deer Creek Project consists of a 66,000 acre foot reservoir to be built on Deer Creek, designed to capture the entire tributary inflow from Deer Creek above the reservoir in most years. The Project is planned and permitted by state and federal agencies as a multi-purpose project for "municipal, irrigation, industrial, fish and wildlife, recreation, flood control, and possibly hydropower production." *See* Nebraska's Response to Wyoming's Motion for Summary Judgment (Aug. 22, 1988) at 48-49 (Docket No. 81). With the exception of the relatively small amount of water consumed historically by irrigation, all of the Deer Creek inflows reaching the North Platte are apportioned between Nebraska and Wyoming pursuant to the Decree.[26]

On September 11, 1987, Wyoming moved the Special Master for summary judgment, seeking a declaration that "[t]he Decree affirmatively exempts ordinary and usual municipal uses from any restriction." Motion of the State of Wyoming for Summary Judgment at 5 (Docket No. 23). The object of the motion was to facilitate the construction of the proposed Deer Creek Project without having to address the adverse impacts of the project on Nebraska's irrigation apportionment. While acknowledging that depletions would result from the construction of Deer Creek Reservoir, Wyoming argued that such depletions were "immaterial to the question of whether Deer Creek Reservoir violates the Decree." Brief in Support of Motion at

[26]During the non-irrigation season, the inflows from Deer Creek have contributed to the Inland Lakes account since the commencement of the operation of the North Platte Project. Inflows have also contributed to the irrigation storage accounts in Guernsey and Glendo reservoirs. These accounts are protected by the injunctions in ¶¶ III and XII(a). The only non-irrigation season apportionment in 1945 was made to Nebraska in the amount of 46,000 acre feet for transfer to the Inland Lakes. The apportionment of 46,000 acre feet to the Inland Lakes during the non-irrigation season, including the inflows from Deer Creek, benefited Wyoming because it was adopted as a charge against the seasonal requirement for the Interstate Canal, reducing the irrigation season demand for natural flow in the Whalen/Tri-State Dam reach of the river. Doherty Report at 61.

91 (Docket No. 23). Wyoming's conclusion was based on its argument that ¶ X empowers municipalities with the unqualified right to interfere with the apportionment effectuated by the Decree. *Id.* at 92-94.

Master Olpin denied the motion, noting that under ¶ XIII(c) "the Court expressly retained jurisdiction for the purpose of examining 'the effect of the construction or threatened construction of storage capacity not now existing on tributaries . . . between Pathfinder Reservoir and Guernsey Reservoir.'" Tenth Memorandum of Special Master at 55 (Docket No. 119). He noted the potential impact on the Inland Lakes if Wyoming's view prevailed. *Id.* at 56. This view was incorporated into the First Interim Report of June 14, 1989. *Ibid.* at 27-30 (Docket No. 140).

On February 22, 1991, Wyoming again moved for summary judgement, maintaining that Nebraska had failed "to come forward with facts that would establish any injury to her apportionment" as a result of the threatened construction of Deer Creek Reservoir. Wyoming Second Motion for Summary Judgment at 3-4 (Docket No. 294). Alternatively, Wyoming moved for partial summary judgment, asserting that under the Special Master's previous ruling "purely municipal uses of Deer Creek Reservoir are exempt under Paragraph X of the Decree." *Id.* at 4. Wyoming sought confirmation that the Deer Creek Project was embraced by the alleged "municipal exemption." *Id.* at 4-5. In doing so, Wyoming asserted that it would ignore the state and federal planning and permitting documents which define the Deer Creek Project as a multi-purpose project. Wyoming argued that she would take it upon herself to limit Deer Creek to purely municipal uses, thus allowing the Project to fit within the so-called municipal exemption.

Nebraska responded to Wyoming's alternative motion by maintaining that Deer Creek must be evaluated by XIII (c).[27] *See* Nebraska's Response to Wyoming's and Colorado's Motions for Summary Judgement (Apr. 25, 1991) at 71-77 (Docket No. 335). The underlying premise was that ¶ X does not foreclose an inquiry under ¶ XIII(c) concerning the effect of new tributary storage capacity, whether for municipal use or any other purpose.

A. A Plain Reading of ¶ X Cannot Invert the Subject and Object of the Sentence and Simultaneously Change the Predicate from a Negative Term to a Positive Term

After concluding that there are genuine issues of material fact relating to the extent to which the Deer Creek Project would undermine Nebraska's apportionment, Master Olpin stated that the parties would proceed to trial on the effects of Deer Creek "*unless* Wyoming can establish that the . . . Project fits within the Decree's paragraph X exemption." Second Interim Report at 77 (emphasis in original) (Docket No. 463). While describing ¶ X as "a broadly stated exemption" for municipal uses, the word "exemption" appears nowhere in the record in the 1945 proceedings or in Master Doherty's recommendations, the Court's opinion, or the Decree. *Id.* at 72. Master Olpin also states that "[t]here is little to be found in the Record of the original proceedings on the origin or nature and scope of the paragraph X municipal exemption." *Id.* at 78. Viewed as an *exemption*, Master Olpin is correct. There is considerable evidence in

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[27]This was the basis of Nebraska's Petition in relation to the Deer Creek Project. Paragraph 3(c) of the Petition requested the following relief:

> 3. The State of Wyoming is presently violating and threatens to violate the State of Nebraska's equitable apportionment established in the Decree by:
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> • • •
>
> c. Depleting the natural flows of the North Platte River by the proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir . . . .

Nebraska's Petition at 2 (Docket No. 1).

the original proceedings, however, which explains the purpose, as well as the nature and scope of ¶ X.

The essence of Master Olpin's error lies in his conclusion that ¶ X "exempts consumption for domestic, municipal and stock watering purposes *and thereby countenances some reductions in water supplies* . . . ." *Id.* at 86 (emphasis added). To arrive at his "plain meaning," Master Olpin makes two rather violent changes in the syntax of the sentence. He does not recognize the difference between the proposition that ¶ X expressly states that the Decree will not take anything away from municipalities as opposed to granting to municipalities an affirmative right to reduce the water supply.[28] His view that ¶ X gives municipalities the affirmative power to reduce or deplete the water supply, *i.e.*, to deplete the water apportioned for irrigation purposes by the provisions of the Decree, contrasts sharply with the language of ¶ X. It is possible that Master Olpin construes ¶ X as a grant of an

[28]Elsewhere Master Olpin states that "the common sense reading of the words is that [municipal uses] are simply to be allowed under the Decree and that the equitable apportionment pursuant to the Decree's remaining provisions act only upon the water remaining after [the municipal uses]. . . ." *Id.* at 82-83. Paragraph X, however, does not create a special category of municipal water and then state that the irrigation apportionment was created out of a separate body of water. Master Olpin's reading is not a common sense reading, but rather an undoing of the plain language of ¶ X. As is discussed below, Master Olpin's distortion of ¶ X may derive from a misunderstanding of the water rights preference system in the West. *See infra*, pp. 48-51.

Under the Master's interpretation of ¶ X in which municipal rights rise to a superior class above agricultural or industrial rights, an inconsistency is created with intrastate preference law. Under the principles announced in *Hinderlider v. La Plata & Cherry Creek Irrigation Co.*, 304 U.S. 92 (1938), the superior municipal right created by Master Olpin preempts state preference law allowing a taking without compensation. His reading also negates ¶ XII(a), which confirms priority of appropriation intrastate, as well as negating his recognition that "Nebraska is now in agreement with Wyoming that the municipal water rights of Casper . . . are properly administered in priority with other Wyoming water rights." Second Interim Report at 72 n.98 (Docket No. 463).

affirmative right to deplete by reading the sentence to say that there are *no* restrictions on municipal uses. As written, ¶ X reads:

> **This decree** shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption.

325 U.S. at 670. Master Olpin may be reading the sentence this way:

> **Nothing** shall affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption.

By misreading ¶ X in this manner, one could conclude that municipal uses are superior or placed in a preferred category by ¶ X. This rendition of ¶ X does not appear in the Decree, however.

To state the basic error simply, Master Olpin changes the words '[t]his decree shall not affect or restrict municipal uses' to mean 'municipal uses can affect or restrict the apportionment set forth in the provisions of the Decree.' In doing so, Master Olpin inexplicably inverts the subject and object of ¶ X, replacing "decree" with "municipal uses," and simultaneously changes the predicate of the sentence from a negative term ("shall not affect or restrict") to a positive term ("can affect or restrict").[29]

The history of ¶ X in the original proceedings supports Nebraska's position. Master Olpin's statement to the contrary is simply incorrect. *See* Second Interim Report at 78 (Docket No. 463). Beginning with his own proposition that ¶ X creates a right to deplete, Olpin errs by misstating that Master Doherty "recommended to the Court

[29]In logic, the Master's error is referred to as an immediate inference on the square of opposition. The Master's reading of ¶ X is exactly the same as equating "dogs cannot hurt cats" with "cats can hurt dogs," *i.e.*, inverting the subject and object and changing the verb from the negative to the positive.

an exemption for ordinary and usual domestic and municipal uses served by diversions from the North Platte River in Colorado and Wyoming." *Id.* (incorrectly paraphrasing Doherty's Report at 180). What Doherty recommended, however, was not that municipalities enjoy a special status in terms of the right to deplete the North Platte, but rather — in certain terms — that the injunctions recommended in the Decree were not intended to interfere with such diversions and uses. *See* Doherty Report at 180.

On exceptions to Doherty's Report, only Wyoming addressed the municipal use aspect of the recommendations. Specifically, Wyoming wished to include tributary waters and stock watering uses. Exceptions of Defendant, the State of Wyoming, to the Report of Michael J. Doherty, Special Master (Nov. 16, 1944) at 24, Appendix at A-48. In its brief on exceptions, Wyoming's proposed municipal Decree provision was "that the injunctions herein contained shall not comprise any restriction upon the diversion from the North Platte River and tributaries in Colorado and Wyoming of water for ordinary and usual domestic, municipal and stock-watering purposes." Brief of Defendant, State of Wyoming (Jan. 29, 1945) at 84, Appendix at A-45. In other words, both Master Doherty and Wyoming recommended that the Court fashion a decree which would release or immunize municipalities from the operation of the injunctions in the Decree. Provisions of the Decree which had no coercive effect were thought harmless.

In its opinion in 1945, the Court described the parties' agreement regarding municipal uses *vis-a-vis* the recommended decree by using Wyoming's language:

> The Special Master reports that the parties are agreed that there should be no restriction upon the diversion from the North Platte River in Colorado or Wyoming of water for ordinary and usual domestic and municipal purposes and consumption and that nothing in the recommended decree is intended to or will interfere with such diversions and uses.

325 U.S. at 656. The Court made no changes from the related language in the Master's report other than to adopt as "appropriate" Wyoming's suggestions to protect the tributaries as well as the mainstem of the river and to include stock-watering purposes. *Id.* The Court's language in its opinion was repeated by Nebraska in formulating its Proposed ¶ X Decree provision.[9] *See* Complainant's Proposed Form of Decree and Request for Permission to Oppose Proposals of Other Parties at 9-10, Appendix at A-53-54. Supporting reference was made to Doherty's Report at 180 and the Court's opinion at 656. The same language was also recommended by Wyoming, Colorado, and the United States. Their proposed ¶ XI provided that "[t]his decree shall not affect or restrict" municipal uses or diversions. *See* Form of Decree Proposed by the State of Wyoming, Defendant, the State of Colorado, Impleaded Defendant, and the United States of America, Intervenor at 8, Appendix at A-57. It did *not* say that "**nothing** shall affect or restrict" municipal uses or diversions, *i.e.*, that municipalities can do what they please.

In his Second Interim Report, Olpin also omits any discussion of the parties' objections to one another's proposed form of decree, all of which reinforced the parties' intent to avoid onerous requirements on domestic, municipal, and stockwatering uses. In relation to Nebraska's proposed ¶¶ I(b) and II(b), Nebraska sought decree provisions that merely stated that Colorado and Wyoming would be restricted in the storage of water in North Park, Colorado, and above

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[9]The Court had instructed the parties to submit a form of decree within 90 days of the Court's opinion. 325 U.S. at 657. A two-day conference was held, but the parties were able to agree to the language of the Decree only in part, resulting in separate proposals. The Court's expression of the Special Master's and Wyoming's comments on domestic, municipal, and stockwatering uses was agreed upon by all parties at the two-day conference. Where agreement had been reached, Nebraska proposed "the exact language proposed by the other parties." Complainant's Proposed Form of Decree at 2.

Pathfinder Reservoir in Wyoming. Complainant's Proposed Form of Decree and Request for Permission to Oppose Proposals of Other Parties at 3 and 4, Appendix at A-51-52; *cf.* ¶¶ I(b) and II(b), 325 U.S. at 665-666. Wyoming and Colorado objected to Nebraska's proposed ¶¶ I(b) and II(b), stating that it was necessary to add the phrase "for irrigation purposes" to the limitations. They reasoned:

> (a) The issues made up by the pleadings in this case only involved water uses for irrigation purposes, and the Court specifically states (Opinion p. 1) that "the controversy pertains to the use for irrigation purposes of the water of the North Platte River, a non-navigable stream."
>
> (b) If this phrase is omitted ["for irrigation purposes"], Paragraph IX Nebraska Proposal - Paragraph X Joint Proposal - would require records of storage in stock ponds, municipal water tanks, and fish ponds.
>
> (c) If the phrase is omitted, there is an inconsistency with Nebraska Paragraph X - Joint Paragraph XI.

Form of Decree Proposed by the State of Wyoming, Defendant, the State of Colorado, Impleaded Defendant, and the United States of America, Intervenor at 11, Appendix at A-58. They were concerned that despite Nebraska's proposed ¶ X, Nebraska's proposed ¶¶ I(b) II(b) and ¶ IX would result in restrictions on municipal uses requiring an accounting of municipal storage in North Park, Colorado, and above Pathfinder Reservoir in Wyoming.

Nebraska did not believe that the additional language was needed in Nebraska's proposed ¶¶ I(b) and II(b) because the language was surplus to what ¶ X had already accomplished, according to the parties' previous agreement. Objections of State of Nebraska to Joint Proposal for Decree filed by the State of Wyoming, Defendant, the State of Colorado, Impleaded Defendant, and the United States of America, Intervenor at 3, Appendix at A-63. The Court did add the language "for irrigation purposes" in ¶¶ I(b) and II(b) in order to make ¶¶ I(b) and II(b) consistent with ¶ X, as Colorado and

Wyoming had argued. Unaffected, however, was that ¶ X's only purpose was to keep the Decree from interfering with municipal uses and to shield those uses from burdensome accounting requirements.

Notwithstanding the history — indeed, without attributing any significance to it — Master Olpin reads the "common sense" or "plain meaning" of ¶ X to mean that municipal, domestic, and stockwatering uses have free access to the entire river before the Decree comes into play. Second Interim Report at 82-83 (Docket No. 463). Ignoring Wyoming law, Master Olpin believes that only after these non-irrigation uses are filled can any remaining supply be apportioned to or used for irrigation purposes. With respect to the proposed Deer Creek Project, Master Olpin's interpretation means that any part of the river, whether on the mainstem or tributaries, could be completely depleted without consideration of the effect on the irrigation uses set forth in the Decree. In essence, Olpin creates a separate, artificial pool of water, which is skimmed from the common pool of natural flows of the North Platte and its tributaries, available only for use by domestic, municipal, and stockwatering users. This interpretation gives municipal uses an absolute superiority over irrigation uses, directly upending the law of priority of appropriation in Wyoming. Such a violation of the principles of intrastate law brings the Master's interpretation of ¶ X into conflict with the Decree, including ¶ XII(a). *See supra* p. 36 n.28.

B. Paragraph X, Which Immunizes Municipal Uses from the Operation of the Provisions of the Decree, Does Not Apply to the Court's Retained Jurisdiction to Resolve Disputes Yet to be Addressed by the Court.

Master Olpin's revision of ¶ X causes the greatest difficulty by its application to the Court's retained jurisdiction under ¶ XIII. The Master's recommendation of a trial phase to "determine whether Deer Creek qualifies under paragraph X of the Decree," would contravene the Court's retention of jurisdiction in ¶ XIII(c) to evaluate the impact of tributary storage on the apportionment. Aside from changing the plain meaning of ¶ X, the Special Master's critical

error lies in his use of ¶ X to override the intent of ¶ XIII. As a matter of law, ¶ X does not grant municipal storage projects immunity from review by the Court in accordance with ¶ XIII of the Decree.

Nebraska sought review of the Deer Creek Project under ¶ XIII(c). Paragraph XIII retains broad jurisdiction for the Court to address issues which may bear an apportionment made by the Decree:

> XIII. Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:
>
> • • •
>
> (c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;
>
> • • •
>
> (f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

325 U.S. at 671-672.

In denying Wyoming's first motion for summary judgment, the Special Master acknowledged that in ¶ XIII(c) "the Court expressly retained jurisdiction for the purpose of examining 'the effect of the construction or threatened construction of storage capacity not now existing on tributaries . . . between Pathfinder Reservoir and Guernsey Reservoir." Tenth Memorandum of Special Master at 55 (Docket No. 119). While the Master's decision appeared to rest on ¶ XIII(c), he also adopted the "municipal exemption" language promoted by Wyoming. Tenth Memorandum at 59-62 (Docket No. 119); First Interim Report at 31-32 (Docket No. 140).

Having adopted Wyoming's argument that ¶ X exempts municipal uses from the Decree, Master Olpin determined that such an exemption necessarily prevents the exercise of jurisdiction in ¶ XIII(c), even if the ¶ X "exemption" may be inapplicable to the other provisions of ¶ XIII:

> I do not accept [that paragraph X does not foreclose the XIII(c) inquiry] as there is nothing on the face of paragraph X to support such a narrowing of the municipal exemption.
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> • • •
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> That is not to say, of course, that municipal uses can in no circumstances be scrutinized. . . . Should threatened municipal uses turn out to pose risks of significant impacts on natural flows, paragraph XIII(f) can be invoked.

See Second Interim Report at 74 n.99 (Docket No. 463). Master Olpin does not view ¶ XIII(c) as a procedural provision which retains jurisdiction to address a potential future problem, *i.e.*, the effects of the future development of tributary storage. Instead, he views ¶ XIII(c) as a substantive provision which is subordinated to the "municipal exemption" granted in ¶ X. This view, however, makes no sense.

A decree is the final declaration of a court announcing the legal consequences of the facts found. *See* Black's Law Dictionary (4th Ed. 1968). It results from the application of legal principles to the facts presented and determines the rights and obligations of the parties as they appear from the evidence, as found by the court.

Jurisdiction is the authority by which a court takes cognizance of and decides a case or an issue. *See id.* It is the legal right by which a court exercises its authority. A retention of jurisdiction is the preservation of the right and power of a court to adjudicate particular matters.

With respect to certain unaddressed and unresolved aspects of a case, a court may retain its jurisdiction to treat the matter at a later time, when the matter becomes ripe and its resolution is necessary. A retention of jurisdiction is accomplished by a decree provision. By its nature, however, a decree provision retaining jurisdiction does not grant or deny a remedy sought or in any way determine the rights or obligations of the parties. Such a provision does not apply the law to the facts found from the evidence, but retains the court's legal authority to receive evidence and apply the law at a later time.

A provision in a decree which mandates that the decree shall not affect or restrict something, *i.e.*, that the operative provisions of a decree shall in no way define, limit, constrain, or diminish something, refers only to those other provisions which have decided something and have the power to define, limit, constrain, or diminish something else. Such a provision does not refer to a provision which retains jurisdiction to determine relative rights and obligations in the future.

In this case, the Court retained jurisdiction in ¶ XIII(c) to address "[t]he question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir. . . ." 325 U.S. at 672. Paragraph X of the Decree states that "[t]his Decree shall not affect or restrict" municipal uses of water. Because the proposed Deer Creek Project is in part a municipal project, Master Olpin has stated that "should the Deer Creek Project qualify for the municipal exemption, it may proceed even if its depletions would otherwise exceed the limitations that might be imposed under ¶ XIII(c)." Hearing Draft of Second Interim Report at 99 (Docket No. 428). In reaching this conclusion, Master Olpin has not only divined the outcome of a potential future

exercise of the Court's jurisdiction, but has also tacitly construed ¶ XIII(c) as a provision which has decided something in a way which has the power to define, limit, constrain, or diminish something else. Paragraph XIII(c), however, has decreed nothing.[31]

An examination of the record also demonstrates that ¶ XIII(c) was not intended to be preempted by ¶ X. Paragraph XIII(c) has its roots in the drought conditions of 1931-1940 when the evidence was taken. In his Draft Report in 1944, Special Master Doherty expressed his concern that future development could exhaust the dependable supply:

> . . . [I]n view of the possibility that the present demand may substantially exhaust or exceed the present resources of the river, I should say, generally speaking, that no reservation should be made for future development (assuming such reservation ever to be proper) unless and until it is demonstrated that the supply under future conditions shall be more than adequate to serve existing demands.

Draft Report at 8, Appendix at A-67. Master Doherty went on to affirm that "[o]n the oral argument it was suggested that further construction of storage facilities should be restricted, since the result of such construction might be to reduce the outflow from the tributaries now available for storage in the off-channel reservoirs of the Interstate Canal." *Id.* at 26, Appendix at A-71.

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[31]The Court was fully aware of the broad scope of ¶ XIII, which occasioned a dissent by Justices Roberts, Frankfurter, and Rutledge. 325 U.S. at 657-664. The gravamen of the dissent was that through ¶ XIII the Court "undertakes to assume jurisdiction over three quasi-sovereign states and to supervise, for all time, their respective uses of an interstate stream on the basis of past use . . . ." 325 U.S. at 657. The dissenting justices fully understood the breath of ¶ XIII and its applicability to disputes such as this. Although time has not justified their fears of a repeated use of the Court's original jurisdiction, it would be incorrect to disable ¶ XIII on the basis of a misreading of ¶ X.

Because of the possibility of increased river flows, and the lack of specific evidence on future threatened depletions, Doherty declined to recommend a present restriction. Instead Master Doherty recommended:

> (1) A present decree effecting a water distribution by means of the imposition of a minimum of restriction and by the simplest possible method that will serve present and near future purposes. (2) Retention by the Court of jurisdiction to amend the decree if and when it shall be made to appear that important changes of condition have occurred or that any assumption or forecast as to the future upon which the decree was based has by subsequent experience proved erroneous, and that by reason of such changes of condition or errors of prediction equity requires amendment of the decree.

Doherty Report at 122.

The Court agreed with Master Doherty:

> The United States, however, insists that some regulation of the tributaries between Pathfinder and Guernsey is essential. It claims that there are possibilities of future additional storage on these tributaries and that if future storage is increased there will be a reduction in tributary flows into the main river available for storage in the Guernsey, Lake Alice and Lake Minatare reservoirs of the North Platte Project. . .. In absence of evidence showing what contribution these tributaries now make to the supply of the reservoirs or what additional storage projects may be possible or what their effect might be, the Special Master concluded there was an insufficient basis for any present limitation on storage. We find no evidence of any present threat to the water supply from this source. If such threat appears and it promises to disturb the delicate balance of

> the river, application may be made at the foot of the decree for an appropriate restriction.

325 U.S. at 624-625. Paragraph XIII(c) was added to address these potential depletions on the tributaries. *Id.* at 672. The unqualified language of ¶ XIII(c) was chosen to permit the review of any storage project, whether for irrigation, recreation or municipal uses, which could adversely affect or deplete the flows from the Pathfinder to Whalen reach of the river. In view of Master Olpin's concern that Nebraska and the United States are reading ¶ X too narrowly, it is ironic that he has interpreted ¶ XIII(c) in the same manner.[32]

C. The Special Master's Revision of ¶ X Creates Numerous Problems of His Own Making.

The result of Master Olpin's revision of ¶ X creates many discrete problems. Given his reading of ¶ X, numerous "vexing questions," "complex issues," and "mysteries" are brought to his attention. Second Interim Report at 73, 79, 87 (Docket No. 463). Master Olpin is compelled to express concern over questions raised solely by his own analysis of ¶ X. For example:

> Indeed, paragraph X poses some mysteries, as the United States has shown. During the original proceedings, the parties strenuously battled over small quantities of water, such as the 2,[9]00 acre feet of inflows from Spring

[32]Olpin refuses to read ¶ X "narrowly" because it "exempts municipal uses of water "from the North Platte River and its tributaries," including the tributaries between Pathfinder and Guernsey. He does not give equal treatment to ¶ XIII(c), which refers, without qualification, to any "storage capacity not now existing on tributaries ... between Pathfinder ... and Guernsey. ..." *See* Second Interim Report at 74 n.99 (Docket No. 463); 325 U.S. 672.

> Creek. *See* Decree ¶ 5. Yet, all of the parties agreed to paragraph X.[33]

Second Interim Report at 79 (Docket No. 463). Master Olpin also admits that his reading of ¶ X creates problems with respect to the intrastate administration of prior appropriation. *Id.* at 72-73 n.98. Each of these problems, however, arises from Master Olpin's upended reading of ¶ X.

His principal vexing question derives from his discussion of Wyoming's water rights preference system which he uses to support his criticism of the correct reading of ¶ X. Master Olpin's reasoning, however, reflects a misunderstanding of the preference system, as well as a misunderstanding of the significance of ¶ XII(a). He attempts to explain the matter this way:

> After expressing some inconsistent views earlier in the present proceedings, Nebraska is now in agreement with Wyoming that the municipal water rights of Casper and the other Wyoming communities are properly administered in priority with other Wyoming water rights. March 1992 Transcript at 39-40. This shared view is consistent with paragraph XII(a) of the Decree, which provides that the relative rights of water users within the three States are not affected "except as may be otherwise specifically provided herein." There is no Decree provision that specifically calls for a contrary administration of municipal water rights.

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[33]There is no mystery, of course, unless ¶ X is misread to give municipalities an unqualified right to deplete the river. Master Olpin also fails to recall the strenuous battle over the Spring Creek inflows as it related to the apportionment of the Laramie inflows. Why he finds the battle significant in the context of his reading of ¶ X, but meaningless in relation to the Laramie troubles both Nebraska and the United States. During oral argument, counsel for the United States commented that given that the Court found the supply met only 48% of demand and that the parties were fighting for every drop of water, "It's not plausible to believe that they were contemplating a 60,000 acre foot storage project when they agreed to [¶ X]." June 7, 1991 Transcript at 44, (Docket No. 366).

> Under both Wyoming and Nebraska law, preference is accorded municipal uses to the extent "that a municipal use could deprive a senior irrigator or other nonpreferred user of water only if compensation were paid for the taking." (Citation omitted). Wyoming has declared that "[n]either state ever asserted that a municipal water right should be exempt from the intrastate law of prior appropriation." *Id.* Those principles of intrastate administration pose vexing questions for the interpretation and application of paragraph X . . . .

Second Interim Report at 72-73 n.98 (Docket No. 463).

The combination of Master Olpin's apparent misunderstanding of water rights preference systems in the West and his reading of ¶ X creates an anomaly which he describes as the possibility of "inequitable treatment of holders of senior Nebraska appropriative rights." *Id.* at 86. He explains the anomaly this way:

> Now that all parties are agreed that Wyoming will administer municipal water rights in priority, a circumstance might arise making it necessary for Wyoming to acquire senior water rights for a proposed municipal water project. The United States raises the specter of Wyoming invoking eminent domain powers that are available under Wyoming law to condemn only the water rights of impacted senior Wyoming water users, while adopting the rationale that paragraph X authorizes the reductions in supplies so far as Nebraska's senior users are concerned. Thus while both the Wyoming and Nebraska senior rights would be taken or impaired, there would be payment of just compensation only

to the Wyoming water users. *See* March 1992 Transcript at 83-88.

Id. at 86-87 (footnote omitted).[34]

It is apparent that Master Olpin does not understand Wyoming's preference system. Like the preference systems in other western states, the Wyoming system allows a municipality to condemn an irrigation right for just compensation and to transfer the right for municipal use. A change to a preferred use conveys only the right condemned — it does not subordinate the rights of others to the preferred use, *i.e.*, changing a use of water to a preferred use does not alter the priority of the condemned right. *Town of Newcastle v. Smith*, 28 Wyo. 371, 376-378, 205 P. 302 (1922). The transfer of the right is also done in such a way as to keep the river system whole. If an irrigation right is condemned by a municipality and transferred to municipal use, Wyoming law — as well as the laws of the other western states — requires that the regimen of the river be kept whole by limiting the municipality to the same consumption or depletive effect on the river. The result is to insure the continuation of the historic flows below the condemned right.

While recourse to the preference system under Wyoming law, if properly applied, would leave the same amount of natural flow in the Whalen/Tri-State reach of the river, Olpin mistakenly believes that "while both . . . Wyoming and Nebraska senior rights would be taken or impaired, there would be payment of just compensation only to the Wyoming water users." Second Interim Report at 86-87 (Docket No. 463). Master Olpin does not understand that there would be no taking or impairment of rights in Nebraska. He simply describes this "problem" as a "vexing question." *Id.* at 73 n.98. If he gave ¶ X its plain and unambiguous meaning, however, the question would never arise.

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[34]The "specter" that Master Olpin alludes to was not raised by the United States. *See* March 1992 Transcript at 76-88 (Docket No. 435). The specter is a consequence of Master Olpin's analysis.

Further, the Master recognizes that his reading of ¶ X can upset parts of Nebraska's apportionment which he himself confirmed, *viz.*, the right of the Inland Lakes to store 46,000 acre feet of natural flow during the non-irrigation season. *See* Second Interim Report at 86 n.104 (Docket No. 463). However, if ¶ X is correctly used as a qualification to the provisions of the Decree and not as the grant of a right, the Inland Lakes entitlement will be protected by ¶ XIII(c) or by condemnation of senior agricultural rights by municipalities, resulting in no additional depletions to the regimen of the river.

A related problem is that Master Olpin's reasoning with respect to ¶ X eviscerates ¶ XII(a) of the Decree, which uses the same language as ¶ X in stating that "[t]his decree *shall not affect* . . . [t]he relative rights of water users within any one of the States . . . except as may be otherwise specifically provided herein . . . ." 325 U.S. at 671 (emphasis added). While Olpin notes that "[t]here is no Decree provision that specifically calls for a contrary administration of municipal water rights," it eludes him that the very purpose of the proposed Deer Creek Project is to create contrary administration by allowing a new appropriation of surface water to facilitate continued out-of-priority diversions by Casper.[35] The new appropriation would also be much greater than the Spring Creek flows that the parties

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[35]To the extent the Deer Creek Project is represented to be a municipal project in reality it is a supplemental irrigation project. The Project was precipitated by the fact that Casper's diversion rights have very junior priorities. Given the over-appropriated status of the North Platte River, Casper diverts out-of-priority under Wyoming law, subjecting the city to potential priority calls from downstream irrigators and individual users with senior water rights. To obviate the possibility of being shut down, the Deer Creek Project was designed as a storage reservoir on a downstream tributary, the mouth of which is above the senior irrigators and industrial users. The alleged "exchange" is to impound natural flow and release it to the irrigators and industrial users, as they need it, thus allowing Casper to continue diverting out of priority upstream. The scheme is designed to eliminate priority of appropriation as between Casper and the downstream seniors.

(cont'd.)

insisted be an explicit part of Nebraska' entitlement in 1945. As noted above, Master Olpin finds it vexing that in 1945 the parties "strenuously battled over small quantities of water, such as the 2,[9]00 acre feet of inflows from Spring Creek." Second Interim Report at 79 (Docket No. 463). In relation to his reading of ¶ X, which in the case of Deer Creek would allow the loss to the system of 9,600 acre feet on an average annual basis, Master Olpin discerns a rather conspicuous contradiction. The plain reading of ¶ X, however, does not state or remotely suggest that it licenses municipalities to deplete the apportioned water supplies. It is the Master's construction of ¶ X that creates the problem. Paragraph X should be read as keeping the Decree from interfering with municipal uses, not as a license to deplete that rises above state law. There was no contradiction between ¶ X and the parties' concern over 2,855 acre feet in 1945 because the parties never thought of Master Olpin's reading of ¶ X.

Master Olpin does not understand that his reading of ¶ X allows him to use ¶ X to alter priorities intrastate, contrary to the express prohibition in ¶ XII(a). He also fails to see that the alteration of priorities illustrates the transparency of the alleged municipal nature of the Deer Creek Project. Aside from elevating Casper's junior priorities, the real purpose of the Deer Creek Project is to provide a supplemental supply to senior irrigation rights. Because he has mistakenly given municipalities the power to destroy the apportionment, Master Olpin runs into another "complex issue."

A third problem of Master Olpin's own making is one he has not recognized. The Master states:

> Moreover, the applicability of the paragraph X exemption to the tributaries upstream of Pathfinder is acknowledged

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Paragraph XII(a) of the Decree states that the Decree "shall not affect . . . [t]he relative rights of water users within any one of the States . . . " 325 U.S. at 671. In the context of Deer Creek, Master Olpin's reading of ¶ X of the Decree makes ¶ XII(a) meaningless. Paragraph XII(a) should preclude the construction of the Deer Creek Project in and of itself.

expressly in paragraph IX, which excuses Colorado and Wyoming from record-keeping duties respecting municipal uses in those upstream reaches. There is nothing in paragraph X's text that supports an argument for different treatment of municipal uses on tributaries depending on whether they enter the mainstem upstream or downstream of Pathfinder. Thus, paragraph X means exactly what it says in its statement that the Decree does not affect or restrict municipal uses or diversions of water" from the North Platte River and its tributaries."

That is not to say, of course, that municipal uses can in no circumstances be scrutinized. Paragraph XIII(f) of the Decree contains a catch-all reopener provision authorizing further relief if there should be "any change in conditions making modification of the decree or the granting of further relief necessary or appropriate." Should threatened municipal uses turn out to pose risks of significant impacts on natural flows, paragraph XIII(f) can be invoked. Neither Nebraska nor the United States, however, has sought at this stage to have the municipal exemption itself examined under paragraph XIII(f).

Second Interim Report at 74 n.99 (Docket No. 463). Master Olpin does not realize that his reading of ¶ X would necessarily do one of two things — either the Master is incorrect in his view that Deer Creek could be scrutinized under ¶ XIII(f) or ¶ XIII(f) applies only to municipal development that is not on the North Platte River or its tributaries.

If ¶ X grants municipalities an affirmative right to deplete the apportionment, as Olpin concludes, and it applies, as it says, to municipal uses or diversions of water "from the North Platte River and its tributaries," ¶ X not only would usurp the Court's retained jurisdiction under ¶ XIII(e), but also under ¶ XIII(f). There is no logical difference in the retained jurisdiction under ¶¶ XIII(e) and XIII(f) as those provisions relate to ¶ X. Either ¶ X precludes

examination under both provisions or under neither provision. As noted above, a depletion of 9,600 acre feet on an average annual basis as a result of the Deer Creek Project would be nearly four times more significant than the Spring Creek inflows which the parties battled so strenuously over. Such a significant impact could not be addressed under ¶ XIII(f) because — according to the logical extension of Master Olpin's interpretation — it falls within ¶ X's municipal exemption. Accordingly, the only way the effects of the Deer Creek project could be addressed, if one were to follow Master Olpin's logic, is if the project were developed on some river other than "the North Platte River and its tributaries."

CONCLUSION

The State of Nebraska urges the Court to reaffirm the express apportionment in ¶ V of the inflows of the Laramie River as originally recommended by Special Master Doherty and explicitly affirmed and adopted by the Court in 1945. Master Olpin's report and recommendations should be modified accordingly.

With respect to ¶ X, Nebraska urges the Court to limit the sentence to its plain and unambiguous meaning. Paragraph X does not provide that **nothing** shall not affect or restrict municipal uses; it states that "**[t]his decree** shall not affect or restrict" municipal uses. When limited to its plain meaning, ¶ X immunizes municipal uses from any adverse affect or restriction caused by the operation of the substantive provisions of the Decree. When read as Master Olpin read it, ¶ X grants municipalities an unqualified right to undermine the Decree. The latter reading not only stands ¶ X on its head, but vitiates the Court's retention of jurisdiction in ¶ XIII(c) and results

in numerous contradictions and anomalies which further eviscerate the Decree.

Respectfully submitted,

DON STENBERG
Attorney General of Nebraska
MARIE C. PAWOL
Assistant Attorney General
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

Simms & Stein, P.A.
446 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

APPENDIX

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EDITOR'S NOTE

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NEBRASKA v. WYOMING
(325 U.S. 589)
Decree

DECREE.
(Entered October 8, 1945)

This cause having been heretofore submitted on the report of the Special Master and the exceptions of the parties thereto, and the Court being now fully advised in the premises:

It is ordered, adjudged and decreed that:

I. The State of Colorado, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River and its tributaries for the irrigation of more than a total of 135,000 acres of land in Jackson County, Colorado, during any one irrigation season;

(b) From storing or permitting the storage of more than a total amount of 17,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries in Jackson County, Colorado, between October 1 of any year and September 30 of the following year;

(c) From exporting out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, to any other stream basin or basins more than 60,000 acre feet of water in any period of ten consecutive years reckoned in continuing progressive series beginning with October 1, 1945.

II. Exclusive of the Kendrick Project and Seminoe Reservoir the State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River above the Guernsey Reservoir and from the tributaries entering the North Platte River above the Pathfinder Dam

for the irrigation of more than a total of 168,000 acres of land in Wyoming during any one irrigation season.

(b) From storing or permitting the storage of more than a total amount of 18,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries above the Pathfinder Reservoir between October 1 of any year and September 30 of the following year.

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe and Alcova Reservoirs otherwise than in accordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir; and
Fourth, Alcova Reservoir;

Provided, however, that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the priority decreed for the French Canal and the State Line Canals.

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe or Alcova Reservoirs, and from the diversion of natural flow water through the Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjudged to be senior to said four reservoirs and said Casper Canal,

and which said Nebraska appropriations are hereby identified and defined, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	Canal	Limitation in Sec. Feet	Seasonal Limitation in Acre Ft.
Tract of 1,025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five percent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to this apportionment, provided that in the apportionment of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transportation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula taken from United States' Exhibit 204A:

Reservoir Evaporation Losses

Seminoe, Pathfinder and Alcova Reservoirs.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class "A" pan located at Pathfinder Reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by co-efficient of 70% to reduce pan record to open water surface.

Guernsey Reservoir

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder Reservoir for the period 1921 to 1939, inclusive, using a co-efficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	Area Acres	Daily Losses-Second Feet May	June	July	Aug.	Sept.
Alcova to Wendover	8,360	53	76	87	76	56
Guernsey Res. to Whalen	560	4	5	6	5	4
Whalen to State Line	2,430	16	22	25	22	16

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft.; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of 70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Pathfinder Dam to head of Alcova Reservoir (area 170 acres)

because this area is less than submerged area of original river bed in Alcova Reservoir, and is, therefore, considered as off-set.

Likewise the area between Seminoe Dam and head of Pathfinder Reservoir is less than area of original river bed through Pathfinder Reservoir — considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agreement, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.

VI. This decree is intended to and does deal with and apportion only the natural flow of the North Platte River. Storage water shall not be affected by this decree and the owners of rights therein shall be permitted to distribute the same in accordance with any lawful contracts which they may have entered into or may in the future enter into, without interference because of this decree.

VII. Such additional gauging stations and measuring devices at or near the Wyoming-Nebraska state line, if any, as may be necessary for making any apportionment herein decreed, shall be constructed and maintained at the joint and equal expense of Wyoming and Nebraska to the extent that the costs thereof are not paid by others.

VIII. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from diverting or permitting the diversion of water from the North Platte River or its tributaries at or above Alcova Reservoir in lieu of or in exchange for return flow water from the Kendrick Project reaching the North Platte River below Alcova Reservoir.

IX. The State of Wyoming and the State of Colorado be and they hereby are each required to prepare and maintain complete and accurate records of the total area of land irrigated and the storage and exportation of the water of the North Platte River and its tributaries within those portions of their respective jurisdictions covered by the provisions of paragraphs I and II hereof, and such records shall be available for inspection at all reasonable times; provided, however, that such records shall not be required in reference to the water uses permitted by paragraph X hereof.

X. This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption.

XI. For the purposes of this decree:

(a) "Season" or "seasonal" refers to the irrigation season, May 1 to September 30, inclusive;

(b) The term "storage water" as applied to releases from reservoirs owned and operated by the United States is defined as any water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet natural flow uses permitted by this decree;

(c) "Natural flow water" shall be taken as referring to all water in the stream except storage water;

(d) Return flows of Kendrick Project shall be deemed to be "natural flow water" when they have reached the North Platte River,

and subject to the same diversion and use as any other natural flow in the stream.

XII. This decree shall not affect:

(a) The relative rights of water users within any one of the States who are parties to this suit except as may be otherwise specifically provided herein;

(b) Such claims as the United States has to storage water under Wyoming law; nor will the decree in any way interfere with the ownership and operation by the United States of the various federal storage and power plants, works and facilities.

(c) The use or disposition of any additional supply or supplies of water which in the future may be imported into the basin of the North Platte River from the water shed of an entirely separate stream, and which presently do not enter said basin, or the return flow from any such supply or supplies.

(d) The apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River;

(e) The apportionment made by the compact between the States of Nebraska and Colorado, apportioning the water of the South Platte River.

XIII. Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to the following:

(a) The question of the applicability and effect of the Act of August 9, 1937, 50 Stat. 564, 595-596, upon the rights of Colorado and its water users when and if water hereafter is available for storage and use in connection with the Kendrick Project in Wyoming.

(b) The question of the effect upon the rights of upstream areas of the construction or threatened construction in downstream areas of any projects not now existing or recognized in this decree;

(c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;

(d) The question of the right to divert at or above the headgate of the Casper Canal any water in lieu of, or in exchange for, any water developed by artificial drainage to the river of sump areas on the Kendrick Project;

(e) Any question relating to the joint operation of Pathfinder, Guernsey, Seminoe and Alcova Reservoirs whenever changed conditions make such joint operation possible;

(f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

XIV. The costs in this cause shall be apportioned and paid as follows: the State of Colorado one-fifth; the State of Wyoming two-fifths; and the State of Nebraska two-fifths. Payment of the fees and expenses of the Special Master has been provided by a previous order of this Court.

XV. The clerk of this Court shall transmit to the chief magistrates of the States of Colorado, Wyoming and Nebraska, copies of this decree duly authenticated under the seal of this Court.

NEBRASKA v. WYOMING
(345 U.S. 981)

Order Modifying and Supplementing Decree.
(Entered June 15, 1953)

No. 5, Original. Nebraska v. Wyoming (Colorado, Impleaded Defendant, and the United States, Intervenor.)

The joint motion for approval of a stipulation and to modify and supplement the decree is granted and the following order is entered in compliance with the stipulation:

The parties to this cause having filed a stipulation, dated January 14, 1953, and a joint motion for approval of the stipulation and to modify and supplement the decree entered on October 8, 1945 (325 U.S. 665) and the Court being fully advised:

The stipulation dated January 14, 1953, is approved; and

IT IS ORDERED that the decree of October 8, 1945, is hereby modified and supplemented as follows:

1. In paragraph I(a) of the decree the figure "145,000" is substituted for the figure "135,000."

2. Paragraph XIII is amended by striking the first sentence and substituting for it the following:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief, except that for a period of five years from and after June 15, 1953, the State of Colorado shall not institute any proceedings for the amendment of the decree or for further relief. In the event that within said period of five years any other party applies for an amendment of the decree or for further relief, then the State of Colorado may assert any and all rights, claims or defenses available to it under the decree as amended.

3. Two new paragraphs, as follows, are added to the decree:

XVI. Whatever claims or defenses the parties or any of them may have in respect to the application, interpretation or construction of the Act of August 9, 1937 (50 Stat. 564-595) shall be determined without prejudice to any party arising because of any development of the Kendrick Project occurring subsequent to October 1, 1951.

XVII. When Glendo Dam and Reservoir are constructed, the following provisions shall be effective:

(a) The construction and operation of the Glendo Project shall not impose any demand on areas at or above Seminoe Reservoir which will prejudice any rights that the States of Colorado and Wyoming might have to secure a modification of the decree permitting an expansion of water uses in the natural basin of the North Platte River in Colorado or above Seminoe Reservoir in Wyoming.

(b) The construction and operation of Glendo Reservoir shall not affect the regimen of the natural flow of the North Platte River above Pathfinder Dam. The regimen of the natural flow of the North Platte River below Pathfinder Dam shall not be changed, except that not more than 40,000 acre feet of the natural flow of the North Platte River and its tributaries which cannot be stored in upstream reservoirs under the provisions of this decree may be stored in the Glendo Reservoir during any water year, in addition to evaporation losses on such storage, and further, the amount of such storage water that may be held in storage at any one time, including carryover storage, shall never exceed 100,000 acre feet. Such storage water shall be disposed of in accordance with contracts to be hereafter executed, and it may be used for the irrigation of lands in the basin of the North Platte River in western Nebraska to the extent of 25,000 acre feet annually, and for the irrigation of lands in the basin of the North Platte River in southeastern Wyoming below Guernsey Reservoir to the extent of 15,000 acre feet annually, provided that it shall not be used as a

substitute for storage water contracted for under any existing permanent arrangements. The above limitation on storage of natural flow does not apply to flood water which may be temporarily stored in any capacity allocated for flood control in the Glendo Reservoir, nor to water originally stored in Pathfinder Reservoir which may be temporarily re-stored in Glendo Reservoir after its release from Pathfinder and before its delivery pursuant to contract; nor to water which may be impounded behind Glendo Dam, as provided in the Bureau of Reclamation Definite Plan Report for the Glendo Unit dated December 1952, for the purpose of creating a head for the development of water power.

(c) Paragraph III of the decree is amended to read as follows:

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs otherwise than in accordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir;
Fourth, Alcova Reservoir; and
Fifth, Glendo Reservoir;

Provided, however that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the priority decreed for the French Canal and the State Line Canals.

Storage rights of Glendo Reservoir shall be subject to the provisions of this paragraph III.

(d) Paragraph IV of the decree is amended to read as follows:

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs, and from the diversion of natural flow water through the Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjusted to be senior to said five reservoirs and said Casper Canal, and which said Nebraska appropriations are hereby identified and denied, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	Canal	Limitation in Sec. Feet	Seasonal Limitation in Acre Ft.
Tract of 1,025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District ...	Tri-State	748	183,050
Ramshorn Irrigation District ..	Ramshorn	14	3,000

(e) Paragraph V of the decree is amended to read as follows:

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of

Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to this apportionment, provided that in the appropriation of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transportation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula taken from United States' Exhibit 204A and the stipulation of the parties dated January 14, 1953, and filed on January 30, 1953:

Reservoir Evaporation Losses.

Seminoe, Pathfinder and Alcova Reservoir.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class "A" pan located at Pathfinder Reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by coefficient of 70% to reduce pan record to open water surface.

Glendo and Guernsey Reservoirs.

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder reservoir for the period 1921 to 1939, inclusive, using a coefficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	Area Acres	Daily Losses-Second Feet May	June	July	Aug.	Sept.
Alcova to Glendo Reservoir.....	6,470	43	61	70	61	45
Guernsey Res. to Whalen	560	4	5	6	5	4
Whalen to State Line.....	2,430	16	22	25	22	16

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of 70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Glendo Dam to head of Guernsey Reservoir (area 680 acres) because this area is less than submerged area of original river bed (940 acres) in Glendo Reservoir and is, therefore, considered as off-set.

Above table does not contain computed loss for section of river from Pathfinder Dam to head to Alcova Reservoir (area 170 acres) because this area is less than submerged area of original river bed in Alcova Reservoir and is, therefore, considered as off-set.

Likewise the area between Seminoe Dam and head of Pathfinder Reservoir is less than area of original river bed through Pathfinder Reservoir — considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agreement, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.

Clarence S. Beck, Attorney General, and *Bert L. Overcash*, Assistant Attorney General, for the State of Nebraska, *Howard B. Black*, Attorney General, for the State of Wyoming, *Duke W. Dunbar*, Attorney General, *H. Lawrence Hinkley*, Deputy Attorney General, and *Jean S. Breitenstein* for the State of Colorado, and *Acting Solicitor General Stern* for the United States.

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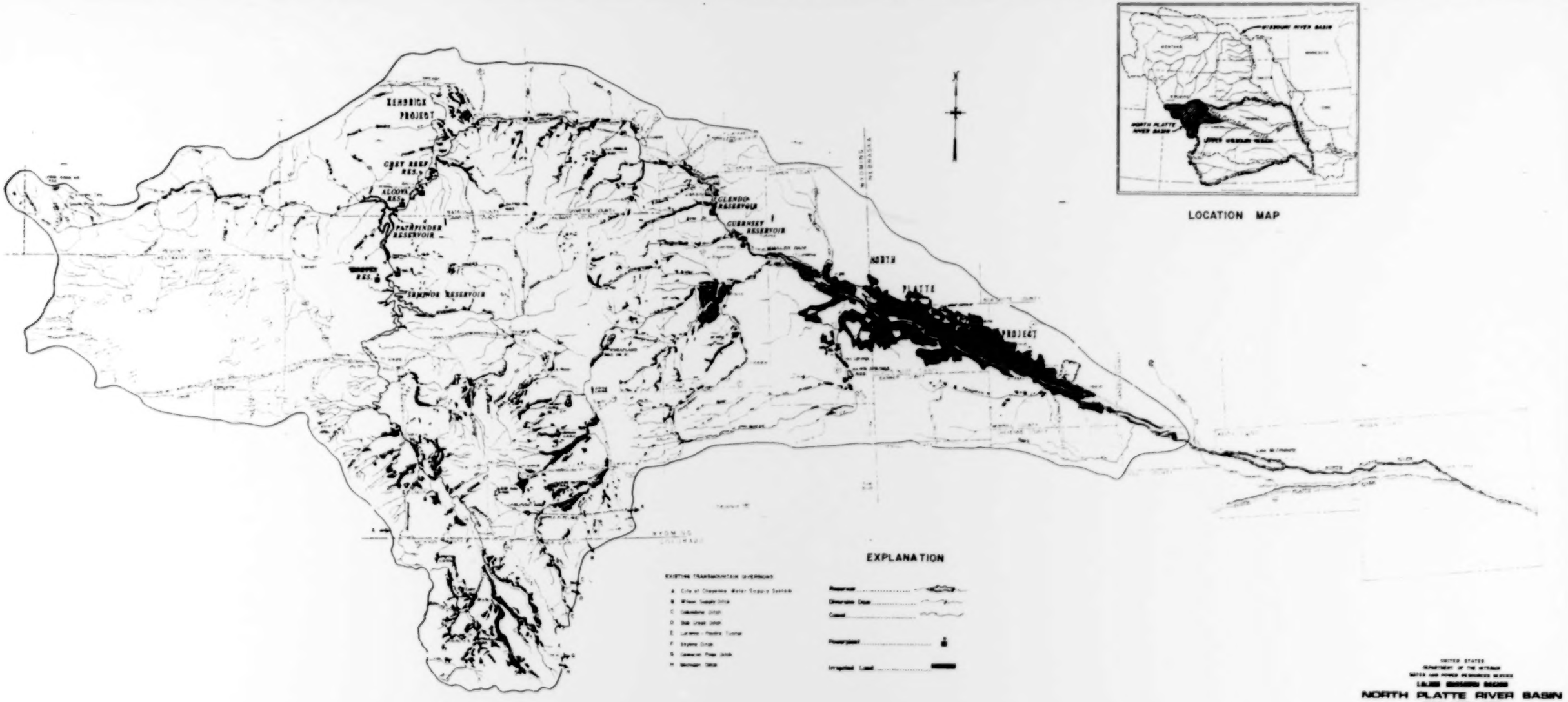

IN THE

Supreme Court of the United States

THE STATE OF NEBRASKA,
Complainant,

vs.

THE STATE OF WYOMING,
Defendant,

THE STATE OF COLORADO,
Impleaded Defendant,

UNITED STATES OF AMERICA,
Intervener.

BEFORE HON. M. J. DOHERTY, SPECIAL MASTER

BRIEF OF STATE OF WYOMING, DEFENDANT

EWING T. KERR,
Attorney General,

W. J. WEHRLI,
Special Counsel,

C. M. CROWELL,
Assistant Special Counsel.

PRAIRIE PUBLISHING CO., CASPER

as it is a border-line region where irrigation is not practiced at all in many years, and fluctuates widely with cycles of dry and wet years (pp. 25682, 24053, 24084-88, 24814-16). We submit that in this region pumping is ideally adapted to the needs of dry years as the expense of continuously maintaining gravity irrigation facilities is obviated. The pumps can be used when necessary in the dry years, and the large maintenance cost of intervening periods when irrigation is much restricted or not used at all will be eliminated. Throughout the upper reaches of the basin in Nebraska it would seem also that the pump is the ideal solution for meeting the larger demands of years of low precipitation and irrigation supply, either or both, as it will provide an additional supply inexpensively when needed without imposing the burden of continuous maintenance of additional gravity facilities. The pump is peculiarly adapted to meet the demands of a stand-by or supplemental supply.

As a matter of equity between Nebraska and the upper states, the lower state should not be permitted to refrain from using an inexhaustible available underground water supply, the application of which to irrigation purposes will relieve the demand upon the stream, thereby permitting additional use and development above. Especially is this true when a large portion of the demand in Nebraska that may be supplied by pump irrigation is intermittent in character, occurring chiefly in the dry years, and of a standby or supplemental nature. The stream system should not be continuously and indefinitely compelled to respond to any demand that can be readily met by the use of underground supplies which can be economically applied to irrigation use. While much argument may be advanced against the use of this underground supply and contention made that it imposes an additional financial burden upon Nebraska irrigators, the proof of the pudding is in the eating, and the pumping development that has actually occurred in Nebraska in the past ten years is complete establishment of the fact that Nebraska irrigators have found it satisfactory, economical and feasible, with definite advantages over gravity supplies.

LARAMIE RIVER

The Laramie River, a tributary of the North Platte, rises in northern Colorado and flows northeasterly into Wyoming and across that state to its confluence with the North Platte near the

town of Ft. Laramie. The course of the stream in Colorado may be observed on C-119-A, and through Wyoming on W-48, the latter exhibit also showing in a general way location of irrigated lands upon the Laramie and its tributaries in Wyoming. Since no part of the Laramie basin is within Nebraska, and since an apportionment of the supply of this stream was made by the Supreme Court of the United States by modified decree rendered October 9, 1922, in Wyoming v. Colorado, 259 U. S. 419; 66 L. Ed. 999, copy of said decree appearing at page 1026 of the Law Edition, we do not conceive that the Laramie river presents any issue in this case, believing that the decree of the Supreme Court is final and conclusive. In the opinion in that case the Court found there was a dependable supply of the Laramie river at Woods, Wyoming, nine miles north of the Colorado line, of 170,000 ac. ft. annually, and an additional supply from the Little Laramie of 93,000 ac. ft., and 25,000 more from lower tributaries usable by the Wheatland project, or a total of 288,000 ac. ft., and that such supply existed after use in Colorado of 18,000 ac. ft. by the Skyline ditch, and 4,250 by the meadowlands. The Court did not consider supply or use below the Wheatland project (Law Edition, p. 1022). The Court found 272,500 ac. ft. sufficient for the irrigation of 181,500 acres in Wyoming with priorities senior to that of the Laramie-Poudre tunnel, a proposed transmountain diversion, which the Court found entitled to an October, 1909, priority, although October, 1902, was claimed. It was determined the supply was adequate for the Wyoming appropriators with a surplus of 15,500 ac. ft. for the Laramie-Poudre tunnel and the decree, therefore, recognized the right of Colorado to divert from the stream 18,000 ac. ft. for the Skyline ditch, 4,250 for the meadow-lands and 15,500 for the Laramie-Poudre tunnel, a total of 37,750. It was further found that Colorado was entitled to continue diversions from Deadman creek through the Wilson Supply or Divide ditch, and in a later decision in the same case involving enforcement of the decree, the Court specified 2,000 ac. ft. per annum as the quantity of this use (286 U. S. 494; 76 L. Ed. 1245, p. 1248 L. Ed.). Including, therefore, this additional 2,000 ac. ft., the total quantity allocated to Colorado is 39,750 ac. ft., and this amount of water Colorado is permitted to divert annually irrespective of what the total supply may be.

While the Court found there was a dependable supply of 272,500 ac. ft. available for Wyoming use after satisfaction of

the Colorado allotment, this quantity has not actually been available since commencement of the suit in 1911, as the study of Mr. Nelson shows that in the 1911-1938 period average annual supply was only 242,500 ac. ft., or 30,000 ac. ft. less (W-111; W-112; p. 19777).

Although the Supreme Court found 181,500 acres in Wyoming to and through the Wheatland project only dependent upon the supply of 272,500 ac. ft., Mr. Patterson made a determination of 180,820 acres irrigated in the entire Laramie river basin in Wyoming (C-118), of which he testified 30,940 were below the Wheatland project (p. 25247). The latest Census data discloses that in 1939 there was irrigated in the Laramie river basin in Wyoming only 164,276 acres (US-204-C, p. 19). Shrinkage in acreage irrigated in Wyoming is no doubt due to the drouth conditions of the past decade, and this is fairly deducible from the Wyoming testimony relating to projects in the Laramie basin, some of which will be hereafter reviewed.

While the Wyoming dependable supply of 272,500 ac. ft. provides only 1.5 ac. ft. per acre for 181,500 acres, without allowance for evaporation losses, particularly in the reservoirs of the Wheatland project which the Court thought would be compensated for by return flows (66 L. Ed. 1021), Meeker, on N-87, estimated headgate diversion of 2.5 ac. ft. on 120,000 acres of meadows, and 2 ac. ft. per acre on 60,000 acres of and near the Wheatland project, or a total of 420,000 ac. ft. He explains this large diversion, which on N-431 he shows to be 20,000 ac. ft. in excess of the supply in the entire basin, by the use of return flows (p. 1859). However, since he shows on N-77 reservoir evaporation losses in the Laramie basin of 41,000 ac. ft., this latter quantity would also have to be accounted for from return water. This is extremely doubtful, and we think the difficulty lies in the assumption of headgate diversions of 2.5 ac. ft. per acre. Upon the lands for which Meeker estimates headgate diversion of 2.5 ac. ft. per acre on N-87, he shows on N-77, 1.1 ac. ft. per acre stream depletion, or return flow of 56%. In marked contrast his exhibit N-77 discloses 1.3 ac. ft. per acre consumptive use on the 60,000 acres in the Wheatland area with headgate diversion of only 2 ac. ft. per acre, as shown on N-87, or return flow of 35%. It is hardly conceivable that consumptive use of 1.3 ac. ft. per acre can be supplied with a headgate diversion of only 2 ac. ft., nor is a return flow of only 35% probable.

Our conclusion is that while Meeker's estimated headgate diversions for the Wheatland project of 2 ac. ft. per acre may not be inappropriate, the consumptive use value is too high, and we do not believe any such supply as 2.5 ac. ft. per acre for the meadowlands has ever been enjoyed. Without intervention of drouth conditions 2 to 2¼ ac. ft. per acre at the headgate is sufficient for normal crop production on the Wheatland project (p. 19067). A major portion of the supply is reservoir water (p. 27299).

The Wheatland project has direct flow appropriations with priority of May 23, 1883, for 58,503 acres comprising 633 sec. ft. from the Laramie river and 135 from Sybille creek (W-74; pp. 19002; 18974). Storage capacity has been provided for the Wheatland project of 7,136 ac. ft. in Wheatland No. 1 reservoir, and 99,000 ac. ft. in Wheatland No. 2, which has been enlarged an additional 91,000 ac. ft. (Engineers' Stipulation, p. 6). 49,341 acres are irrigated (W-75; p. 19032). In addition, 2,800 acres are irrigated in the Bordeaux tract (p. 19015), and 100 acres in the Mule Shoe, or Sybille tract (p. 18970). The latter two tracts comprise respectively 8,666 and 21,000 acres (pp. 19015; 18970). Total irrigated in the original project, Bordeaux and Mule Shoe tracts, is 52,241 acres.

The Laramie Rivers Company project comprises lands irrigated under the Pioneer and Lake Hattie canals from the Big Laramie and Little Laramie rivers. Irrigable lands are shown on W-54; and W-56 is a list of adjudicated rights and permits. Originally it was contemplated 300,000 acres would be irrigated under these systems, and there are presently 139,500 acres under existing rights, and 60,000 acres can be supplied by constructed works (pp. 18589-90). Engineering and construction cost was $1,700,000.00 (p. 18590). Fourteen thousand is the maximum acreage that has ever been irrigated (p. 18605), and was watered up to and including 1934, and for several years prior thereto, but during the past five seasons, including 1939, only 7,200 or 7,300 acres have been irrigated due to shortage of water (p. 18593). Under the Pioneer canal with early rights of April 19, 1879, and October 1, 1884 (W-56), only 7,500 acres have been irrigated the past few years (p. 18606).

The James Lake project comprises 36,000 acres (p. 18699). There are three sources of supply for the James Lake reservoir, the Little Laramie river, Seven Mile and Four Mile creeks

(p. 18700), and other lands are supplied by direct flow rights from the Big Laramie river through the Oasis ditch. In 1939 about 2,000 acres were irrigated from the Big Laramie river (pp. 18702-03), and the largest acreage irrigated between 1934 and 1939 from the James Lake supply was 500 (p. 18705). Prior to 1929 as much as 10,000 acres were irrigated altogether, but acreage has declined very rapidly since 1929, and the James Lake reservoir hasn't been used extensively in the last ten years, and in the last six years not at all, in order to save evaporation and seepage losses (p. 18704).

The North Laramie project is supplied from the North Laramie river and is fully constructed, comprising 7,000 acres (p. 19249). Six hundred forty acres are presently irrigated and the most that has ever been irrigated is about two sections (p. 19246).

The evidence as to the foregoing Wyoming developments in the Laramie basin show large available irrigable acreages for which facilities are constructed which are not irrigated due to lack of water supply. In addition, large areas lie within proposed projects construction of which has not been, or cannot be consummated due to shortage of water. The evidence also shows that large tracts under senior rights such as those of 1879 and 1884 of the Pioneer canal, and 1883 of the Wheatland project, are not irrigated, and with specific reference to the former the testimony is definite that development has been arrested because of lack of water supply (p. 18593).

Without going into greater detail the conclusion is well-founded that large additional opportunities for utilization of the Laramie river supply exist in Wyoming under old priorities. A very moderate supply of only 1.5 ac. ft. per acre at the headgate was provided in the decree of the Supreme Court based upon 181,500 acres on the assumption that 272,500 ac. ft. were available, while as shown by Nelson, actual annual average of the 1911-1938 period is only 242,500 ac. ft. (W-112). Economy of use in the lower state was most certainly and effectively imposed by the decree of the Court.

Meeker states that the discharge of the Laramie river to the North Platte is not a dependable flow and is a very negligible supply (p. 133), and that no dependable water reaches the North Platte from the Laramie basin during the irrigation season (p.

176). That this is true, due to consumptive use upon old rights in Wyoming and Colorado, and that the situation should not be disturbed after uninterrupted enjoyment of these uses for more than 60 years, and more than 20 years subsequent to the equitable apportionment of the stream between Colorado and Wyoming, is apparent.

On W-170 average historical runoff of the Laramie river at its mouth 1904-1940 is 132,000 ac. ft. On his reconstructed upriver water supply at Whalen and other net accretions above the Wyoming-Nebraska line (W-173), Nelson estimates for the future available for downstream use 85,000 ac. ft. annually, of which 49,500 is in the October-April months, and 35,500 May-September (p. 27554). He assumes there will be additional depletion over that represented by the runoff in the 1904-1940 period in the Laramie river basin of 20,000 ac. ft.; that 10,000 ac. ft. will be used to allow for reduction to present conditions of the historical gain between Pathfinder and Guernsey, and an additional 12,000 for losses that may accrue between Pathfinder and Whalen (pp. 27536-37). A conservative appraisal has been placed upon the supply available for downstream use in the future by Mr. Nelson, but one which we think justified due to shortages in the Laramie river basin experienced heretofore, but which may be partially alleviated by reason of recently constructed additional storage for the Wheatland project.

Conclusion with reference to the Laramie river is that the decree should not be disturbed and that its future contribution to the North Platte supply will be as outlined by Nelson.

SOUTH PLATTE RIVER

The South Platte river basin is portrayed on C-160. The South Platte unites with the North Platte to form the Platte river about five miles east of the city of North Platte, Nebraska. Maximum distance from the headwaters of the South Platte in the state of Colorado to the junction of the two rivers is 450 miles (p. 25322), and distance from the point where the river crosses the Nebraska-Colorado line to the confluence of the North and South Platte rivers is 83 miles (p. 25320). The North Platte is a somewhat longer basin since, as shown by C-72, it is 200 miles from the junction of the North and South Platte rivers to the Wyoming-Nebraska line, 455 miles to Pathfinder, and 710 miles to the headwaters of the North Platte in Colorado (pp.

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return flows were assumed, therefore — we will assume that the previous year was a low year — the return flows were therefore assumed as of the high values from May up to the next May; and likewise, in a low year, during which diversions were made, May to September, the return flows were likewise carried through as low values to the next year. That is, this does not follow a water-year, but is followed, as stated, on the assumption that diversion first must be made to produce return flows.

Q. — Do you have before you Wyoming Exhibit No. 173?

A. — I have.

Q. — How many sheets are there in that exhibit?

A. — The exhibit consists of fourteen pages.

Q. — Does that cover data for the 1904-1940 period, of thirty-seven years?

A. — It does.

Q. — And the same lines are included, are they, for each year?

A. — Yes, sir.

Q. — With reference to the run-off at Guernsey, directing your attention to the first year, 1904, from what source was the data obtained for that?

A. — Colorado Exhibit 96, and Wyoming Biennial Reports.

Q. — Those are historical values?

A. — Yes, sir.

Q. — Will you explain Line 2, the Laramie River, and what values you have used on that?

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A. — I previously stated that I had used Laramie River as a depletion factor to allow for the use of historical gains from Pathfinder to Guernsey; that is, I have reduced Laramie River actually nearly 50,000 acre feet from the historical to the value adopted, and for the period of 1904 to 1930, inclusive, I have used this value for Laramie River — that is, the 85,000 acre feet — and have distributed it with relation to what did occur in 1938, that being approximately an average year, and the run-off being approximately the same amount as I have used. Using this distribution gives a May-September values for Laramie River of 35,500 acre feet, which is probably somewhat low, but that was what I had decided upon since there would be no question about its values.

Q. — Is it your purpose on this exhibit to show what the water supply would have been in that respect, reconstructed in the manner that you have indicated?

A. — That is correct.

Q. — Have you used the same values, then, for the Laramie River throughout the exhibit?

A. — Through 1930, inclusive, whereupon the historical values were used.

Q. — From 1931 to 1940, inclusive?

A. — That is correct.

Q. — Why did you use historical values for the 1931-1940 period?

A. — Because they were low, drouth[Sic drought?]-period values, and to have used these would have added some water that was not there.

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Q. — In Line 3 what have you indicated?

A. — This is the Kendrick project return flow, which is from an exhibit just introduced. Its values is used throughout as indicated by the United States exhibit referred to, excepting for the November-March distribution, which I have assumed.

Q. — That values is the same for each year throughout the exhibit, is it not?

A. — Exactly throughout the exhibit.

Q. — What is the item in Line 4, Mr. Nelson?

A. — That is the net return flow which has accrued to the river during the so-called drouth [Sic drought?] period of 1931-1940, from Whalen to the Nebraska line, as has been computed on a previous exhibit and is merely transferred here.

Q. — Is that a mean of the 1931-1940 period?

A. — That is right.

Q. — And are the values in that line the same for each year, on this exhibit?

A. — They are.

Q. — Whh [Sic Why?] did you use the 1931-1940 mean for that value?

A. — For the reason that from the values determined by a previous exhibit, they represent mean values during a drouth [Sic drought?] period, and they would be stabilized and provide at least that much — provide that much of a supply.

Q. — Was it your purpose in that connection to use a value that, while it might be exceeded at some time and probably would be ex-

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ceeded in years of better supply, would in all probability never be less?

A. — That is correct.

Q. — In Line 5 you have a total. What is that, please?

A. — That is the total of all the values above, of Lines 1 to 4, inclusive; that is, this total represents the run-off at Guernsey, Laramie River, the return flow from Kendrick, and the return flow of the Whalen-State line section. That is the total discharge.

Q. — As to the return flow in the Whalen-State line section, that actually represents, does it not, the entire accretion to the stream in that section in the 1931-1940 period; that is a mean of that period excepting the Laramie River?

A. — That is correct.

Q. — What is Line 6?

A. — Line 6 is historical. That is the recorded discharge below Pathfinder reservoir and Alcova reservoir after it began storage.

It is contained as indicated on Sheet 1, in Colorado Exhibits 93 and 96, and Wyoming exhibits, and the information is also available on one or two Nebraska exhibits.

Q. — Will you explain Line 7, please?

A. — Line 7 is obtained by subtracting from the values of Line 5 the value of Line 6. It is the gain between Pathfinder and Guernsey. In order that it may be more easily checked or explained, and to indicate further what the historical situation was, I have shown that in Line 10 for convenience; that is to say, the values

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of net gain, reconstructed, of Line 7 could also be obtained by adding the value of Line 10 to the values of Lines 2, 3 and 4.

Q. — What is the significance of the term "reconstructed," Line 7?

A. — Because at the present time there is no Kendrick project, and Laramie River did not flow in the past as I have used the value hereon.

Q. — Will you state again between what points that net gain originates?

A. — That is the net gain now from Pathfinder reservoir to the Nebraska line.

Q. — What is Line 8, Mr. Nelson?

A. — That is the future conditions inflow as to Pathfinder, designated as such, and hereafter designated as "Adjusted inflow to Pathfinder," on the basis of Exhibit 172 of Wyoming. These are the monthly values which are obtained by the use of the depletion values of Exhibit 172, month by month.

Q. — Will you explain Line 9?

A. — Line 9 is the sum of the inflow to Pathfinder and the net gain from Pathfinder to the Nebraska line. It is a water fund from which uses, or upon which demands can be made and, of course, is predicated upon a complete development of the Kendrick project.

Q. — Have you portrayed in Line 9 the total water fund available for uses, giving consideration to the depletion that you have made as to the Laramie River supply, the effect of the complete development of the Kendrick project, and using for return flow data between

..PAGE
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..TEXT

Whalen and the Nebraska line a mean of the 1931-1940 period?

A. — I have.

Q. — You have also included the effect of an additional depletion above Pathfinder?

A. — That is correct.

Q. — As a matter of fact, Mr. Nelson, you have superimposed these new conditions that you assume would prevail in the future upon the water supply as it actually existed for the year 1904.

A. — That is correct. I am assuming all these elements in operation. It must be understood, however, that this total water fund is a water fund other than is shown hereon. That is, taking, for example, for the value under October on Sheet 2 hereof, the future condition inflow to Pathfinder, which has been added to the value of Line 7 to give the value of Line 9, would have occurred had not diversions been made for Kendrick project to supply the water; that is to say, this is a water fund, not waters which have come to any particular point — not run-off.

Q. — Line 10 has no particular significance, has it, Mr. Nelson?

A. — No, sir; it is just for convenience in checking.

Q. — At the right of the exhibit do you have yearly quantities, which cover the water-year?

A. — I have.

Q. — Also, for the October-April period, and separately for the May-September period?

A. — That is correct.

..PAGE
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..TEXT

Q. — Is the formula the same for each of the years on this exhibit, from 1904 to 1940, inclusive?

A. — Yes. No, excepting for some; that is, the actual flow of the Laramie River has been used for the 1931-1940 period and, of course, the other values will be historical.

Q. — But the same setup is used as to your ten lines on the right-hand margin?

A. — Yes, that is correct, the same setup is used.

Q. — You have used for the 1931-1940 period the mean flow of the Laramie, since that was less than the 85,000?

A. — That is correct. I used the historical flow of the Laramie River.

Q. — Will you turn to Page 14 of this exhibit?

A. — Yes.

Q. — Do you have two sets of means?

A. — Yes, sir.

Q. — For what period?

A. — A mean for the total period of thirty-seven years, 1904 to 1940, inclusive, and for the period of 1931-1940, inclusive.

Q. — For the 1904-1940 period, what is the water-year mean of the reconstructed water fund of Line 9?

A. — Under the year, for the average, it is 1,825,200 acre feet.

Q. — And what is the similar figure for the 1931-1940 mean?

A. — 1,361,000 acre feet.

Q. — I see a footnote (a) at the bottom of Page 14, apparently

..PAGE
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..TEXT

keyed to Laramie River, Line 2, the means of 1904-1940. Will you explain that?

A. — Yes, sir. The value of Laramie River used for 1904-1930 I have just described, and this note appeared here because I studied quite carefully the regimen of the Laramie River before adopting a value for is use, and I find that for the 1915-1940 period the annual run-off as shown on a previous exhibit was 132,000 acre feet average. However, I note here that I also gave consideration to the period of 1920-1939, inclusive, in which the man annual run-off was 127,000 acre feet. I should like to explain another item for the convenience of checking.

Q. — Go ahead.

A. — In the "Year" column, in the 1904-1940 means, will be found, after Line 8, the value 1,224,500 acre feet. This value, subtracted from the present condition run-off at Pathfinder as indicated on a previous exhibit of 1,293,000 acre feet, gives the value that I pointed out a minute ago of the effect of the attempt to consume 75,000 acre feet a year above Pathfinder, and that subtraction results in the actual reduction of 68,500 acre feet.

Q. — Do you have anything additional or in further explanation you want to give about this exhibit?

A. — Yes, sir. The average run-off at Guernsey for the period is indicated in the 1904-1940 mean paragraph, which is historical, being 1,562,000 acre feet, and the actual mean of the whole period of Laramie River annually was approximately 80,000 acre feet, which

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..PAGE
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..TEXT

results from combining the 85,000 for the first part of the period and the historical run-off for the last decade. Line 3, of course, is a constant, and Line 4 is a constant, and the computation of Line 7 indicates the future condition net gain in water between Pathfinder and the Nebraska line, of 600,700 acre feet, of which approximately 285,000 acre feet comes in the May-September period. It is interesting to note that on the bottom line the historical long-time mean gain — Line 10 of these 1904-1940 means — of 287,000 acre feet, occurs approximately half in the October-April period and half in the May-September period. That is an average of historical values. Also, it is interesting to note that in the May-September value of 141,000 acre feet, approximately half of that occurs during the month of May, which is indicated to be 72,200 acre feet. The flow is generally smoothed out during the winter months, is erratic during the May-September months, but is in large part a usable flow.

Q. — Is that all you have to comment on?

A. — I think that covers it, yes, sir.

WYOMING EXHIBIT NO. 148
Elmer R. Nelson, C.E.
1941

NORTH PLATTE RIVER
NET RETURN FLOWS AND ACCRETIONS
Thousands Acre Feet

Season	Net Return Flow Accretions Whalen-Neb.Line May-Sept. a.	Year a.	Nebr.Line-Bridgeport May-Sept. b.	Year b.	Return Flows and Other Accretions-Sectional Bridgeport-Oshkosh May-Sept. c.	Year c.	Oshkosh-North Platte May-Sept.	Year	Totals May-Sept.	Year
1929-30	77.2	166.6	577.4	1153.4	45.8	158.6	120.9	283.1	821.3	1761.7
1930-31	49.0	152.7	403.0	925.6	21.6	190.7	87.5	276.5	561.1	1644.5
1931-32	54.9	109.0	403.7	749.0	43.6	126.6	155.5	381.2	657.7	1365.8
1932-33	78.1	171.1	456.3	863.7	57.8	208.6	201.8	444.6	794.0	1688.0
1933-34	56.0	142.9	227.7	623.1	28.2	173.5	84.8	281.6	396.7	1220.9
1934-35	63.5	118.8	291.0	583.2	65.4	150.7	164.8	338.2	584.7	1190.9
1935-36	51.3	121.0	248.5	540.8	15.9	108.7	73.7	268.4	389.4	1038.9
1936-37	62.2	112.2	307.0	578.7	17.4	113.3	98.1	313.4	484.7	1117.6
1937-38	96.6	158.3	343.1	663.3	81.4	195.9	132.5	334.4	655.6	1361.9
1938-39	89.6	162.0	289.3	597.9	22.2	153.1	79.9	298.9	481.0	1211.9
1939-40	57.6	129.1	201.3	519.3	12.9	92.8	82.1	253.2	353.9	994.4
Average, 1931-1940	66.0	138.0	317.0	664.0	37.0	151.0	116.0	319.0	536.0	1272.0

a. Values of Wyoming Ex. 98 plus flow of Rawhide Creek, 1930-36.
b. Values of Wyoming Ex. 98, 1930-38.
c. Values of Wyoming Ex. 97, 1930-38.

Averages - Whalen to Bridgeport

May-Sept.	Year
381.0	602.3

1931-1940

WYOMING EXHIBIT NO. 150

Elmer R. Nelson, C.E.
1941

NORTH PLATTE RIVER
SPRING CREEK
Acre Feet

Gaging Station in Section 4 - 23 - 58 W.
at Wyoming-Nebraska Line

Data from Nebr. Reports

Year	Oct.	Nov.	Dec.	Jan.	Feb.	March	April	May	June	July	Aug.	Sept.	Year	Oct.-April	May-Sept.
1930								647	526	555	645	625	7253	4255	2998
1931								676	595	553	565	635	7663	4639	3024
1932	615	595	615	615	575	645	595	553	516	492	553	595	7006	4297	2709
1933	676	704	661	676	611	694	617	619	655	655	615	595	7062	3923	3139
1934	738	655	615	528	500	666	595	444	464	214	194	198	5599	4085	1514
1935	615	536	522	553	555	593	549	464	500	668	524	522	6272	3594	2678
1936	615	595	593	534	645	613	490	803	708	657	576	740	7484	4001	3483
1937	603	535	492	512	484	492	476	520	956	744	702	569	7959	4468	349·
1938	595	557	565	579	555	583	567	603	573	508	468	506	6784	4126	2658
1939	551	718	684	712	587	609	607								
1940	583	1061	492	492	460	522	516								
AVERAGE	621	662	582	578	552	602	557	592	610	561	538	554	7009	4154	2855

NOTE: Due to incomplete record this Return Flow stream, entering Nebraska from Wyoming a short distance north of the main gaging station on the North Platte River, was omitted from Wyoming Exs. 86 to 95 and from later exhibits. This run-off enters the river above the Tri-State Canal head gate. The amount of run-off is to be added to Return Flow between Whalen and the Nebraska Line. In the Return Flow between Nebr. Line and Bridgeport the amount of water would show up as a channel accretion in the flows in the exhibits and is not to be added thereto. The amount of run-off should also be added as the inflow from Wyoming to Nebraska at the State Line. It has not been added in the Exhibits.

WYOMING EXHIBIT NO. 170

NORTH PLATTE RIVER IN WYOMING

SECTION NET GAINS, HISTORICAL, AND RUN-OFF AT GAUGING STATIONS

YEARLY FLOWS AT GAUGING STATIONS; OCT. 1 — SEPT. 30

Thousand Acre Feet

1 Year	2 Northgate	3 Gain, Net	4 Saratoga	5 Gain, Net	6 Seminoe	7* Gain, Net
1904	(c)410.0E	587.8	997.8	195.2	1,193.0A	****
1905	370.0E	539.9	909.9	180.1	1,090.0A	****
1906	420.0E	602.5	1,022.5	200.5	1,223.0A	****
1907	530.0E	768.0	1,298.0	396.0	1,694.0A	****
1908	270.0E	394.0	664.0	157.0	821.0A	****
1909	730.0E	1,040.4	1770.4	476.6	2,247.0A	****
1910	250.0E	359.0	609.0	241.0	850.0A	****
1911	360.0E	525.0	885.0	183.0	1,068.0A	****
1912	500.0E	718.1	1,218.1	364.9	1,583.0A	****
1913	360.0E	511.1	871.1	256.9	1,128.0A	****
1914	490.0E	716.9	1,206.9	228.8	1,435.7	****
1915	278.7	340.2	618.9	204.0	822.9	****
1916	375.2	512.1	887.3	163.0	1,050.3	****
1917	626.5	973.6	1,600.1	694.4	2,294.5	****
1918	454.6	638.5	1,093.1	275.1	1,368.2	****
1919	221.0	391.3	612.3	186.5	798.8	****
1920	484.0	761.5	1,245.5	445.9	1,691.1	****
1921	508.9	844.1	1,353.0	306.1	1,659.1	****
1922	275.9	484.4	760.3	270.0	1,030.3	****
1923	506.3	560.5	1,068.8	324.1	(g)1,392.9	****
1924	396.9	436.8	833.7	388.6	1,222.3	****
1925	319.4	518.4	837.8	303.4	1,141.2	****
1926	532.1	729.3	1,261.4	374.6	1,636.0A	****
1927	415.6	614.0	1,029.6	311.4	1,341.0A	****
1928	506.8	742.1	1,248.9	377.1	1,626.0A	****
1929	523.5	695.6	1,219.1	321.9	1,541.0A	****
1930	345.2	345.7	690.9	159.5	850.4	****
1931	182.4	297.8	480.2	108.1	588.3	****
1932	440.1	583.3	1,023.4	341.4	1,364.8	****
1933	258.8	473.1	731.9	307.9	1,039.8	****
1934	89.1	149.4	238.5	73.8	312.3	****
1935	200.6	328.1	528.7	120.9	649.6	****
1936	332.1	470.0	802.0	171.9	973.9	****
1937	215.0	430.7	645.7	257.4	903.1	****
1938	400.3	533.7	934.0	256.9	1,190.9	****
1939	204.7	351.4	556.1	83.9	(a) 640.0	****
1940	155.3	295.6	450.9	72.6	(b) 523.5	****
Means	376.8	547.7	924.5	264.5	1,189.0	****
Means, Present Conditions	370.0	(i)540.0	910.0	260.0	1,168.0	****

Based on Wyo. Ex. 100.

*Information not legible on microfiche copy.

(cont'd.)

WYOMING EXHIBIT NO. 170

1	8*	9	10	11	12	13	14
Year	****	Losses Net	Pathfinder Discharge	Gain, Net	Guernsey	Net, Gain L.R.	Net, Run-off (12)+(13)
1904	****	(d) .0	(e)1,276.4	295.3	1,571.7	135.0E	1,706.7
1905	****	.0	1,229.0	519.0	1,748.0	170.0E	1,918.0
1906	****	.0	1,386.0	387.0	1,773.0	173.0E	1,946.0
1907	****	.0	1,842.3	591.1	2,433.4	295.0E	2,728.4
1908	****	.0	918.6	603.2	1,521.8	125.0E	1,646.8
1909	****	19.8	2,231.3	275.5	2,506.8	305.0E	2,811.8
1910	****	19.0	1,008.6	176.6	1,185.2	65.0E	1,250.2
1911	****	23.9	1,098.4	92.2	1,190.6	65.0E	1,255.6
1912	****	45.7	1,470.0	274.5	1,744.5	170.0E	1,914.5
1913	****	41.1	1,310.5	236.3	1,546.8	130.0E	1,676.8
1914	****	68.2	1,312.5	178.5	1,491.0	120.0E	1,611.0
1915	****	41.7	945.1	349.0	1,294.1	91.4	1,385.5
1916	****	50.8	1,156.0	205.0	1,361.0	71.3	1,432.3
1917	****	71.0	1,994.1	580.7	2,574.8	397.4	2,972.2
1918	****	64.2	1,498.3	526.1	2,024.4	191.5	2,215.9
1919	****	62.8	1,116.6	115.2	1,231.8	70.4	1,302.2
1920	****	70.7	1,373.8	490.4	1,864.2	194.6	2,058.8
1921	****	67.1	1,791.7	163.8	1,955.5	167.1	2,122.6
1922	****	64.0	1,356.4	170.3	1,526.7	89.5	1,616.2
1923	****	56.2	1,087.3	389.2	1,476.5	131.7	1,606.2
1924	****	62.8	1,876.1	351.9	2,228.0	239.8	2,467.8
1925	****	38.2	1,285.5	265.8	1,551.3	72.8	1,624.1
1926	****	49.4	1,446.4	242.5	1,688.9	191.5	1,880.4
1927	****	66.7	1,278.8	332.7	1,611.5	183.4	1,794.9
1928	****	56.8	1,749.8	301.3	2,051.1	216.1	2,267.2
1929	****	95.2	1,719.9	387.3	2,107.2	275.0	2,382.2
1930	****	53.4	1,206.5	278.2	1,484.7	177.0	1,661.7
1931	****	36.0	1,004.0	242.0	1,246.0	99.8	1,345.8
1932	****	36.8	1,311.2	192.4	1,503.6	76.8	1,580.4
1933	****	39.3	1,147.3	368.2	1,515.5	73.2	1,589.1
1934	****	14.0	485.3	107.3	592.6	36.3	628.9
1935	****	16.1	677.6	169.5	847.1	67.0	914.1
1936	****	25.8	1,017.2	74.7	1,091.9	60.1	1,152.0
1937	****	26.6	1,049.4	229.3	1,278.7	72.6	1,351.3
1938	****	43.0	975.5	212.0	1,187.5	80.4	1,267.9
1939	****	38.6	991.5	153.7	1,145.2	54.6	1,199.8
1940	****	24.0	548.9	95.6	644.5	40.2	684.7
Means	****	45.5	1,275.0	287.0	1,562.0	(f)132.0	(h)1,694.0
Means, Present Conditions	****	45.0	1,248.0	277.0	1,525.0	90.0	1,615.0

Sheet 1

WYOMING EXHIBIT NO. 173*
Elmer K. Nelson, C.E.
1941

NORTH PLATTE RIVER
RECONSTRUCTED UPRIVER WATER AT WHALEN
AND OTHER NET ACCRETIONS ABOVE WYO.-NEBR. LINE

Notes on Sources of Data

Line 1. Colorado Exhibit 96 and Wyoming Reports.

Line 2. Previous Exhibit. See note Sheet 14. Annual value for Laramie River adopted, 85.0, for 1904-1930. For 1931-1940, historical. The value allows for correction of Laramie River and gains, Pathfinder to Guernsey, to present conditions.

Line 3. Previous Exhibit.

Line 4. Previous Exhibit. Average of 1931-1940 used for whole period as stabilized Return Flow of Section, Whalen to Nebraska Line.

Line 5. Total of Lines 1, 2, 3 and 4.

Line 6. Colorado Exhibits 93 and 96 and Wyoming Exhibits.

Line 7. Lines 5 minus Line 6. Historical gain plus values of Lines 2, 3 and 4.

Line 8. Wyoming Exhibit 100 adjusted to future conditions; data of previous exhibit.

Line 9. Line 7 plus Line 8.

Line 10. Values of Line 1 minus Line 6 shown for convenient reference.

*Excerpts [Sheets 2-13 yearly data omitted]

Sheet 1

WYOMING EXHIBIT NO. 171
Elmer E. Nelson, C.E.
1941

NORTH PLATTE RIVER
1904-1940
RECONSTRUCTED UPRIVER WATER AT WHALEN AND OTHER NET ACCRETIONS ABOVE WYO.-NEBR. LINE
Thousands Acre Feet

	Oct.	Nov.	Dec.	Jan.	Feb.	March	April	May	June	July	Aug.	Sept.	Year	Oct-April	May-Sept.
						1940									
1. Run-off at Guernsey	17.3	11.8	10.7	9.0	10.5	11.4	16.2	93.3	150.1	116.2	151.1	22.9	644.5	98.9	533.6
2. Laramie River	1.0	1.5	4.5	4.4	5.1	4.6	4.4	1.1	1.9	1.5	0.9	1.2	48.2	29.1	19.9
3. Kendrick Project Return Flow	9.4	9.0	8.0	5.0	5.0	6.0	7.5	7.4	7.5	7.7	11.3	12.2	96.0	49.9	46.1
4. Net Return Flow	19.2	13.5	10.6	8.1	7.2	7.1	6.1	0.7	9.6	10.8	19.8	25.0	137.7	71.8	65.9
5. Total	48.9	39.8	33.8	26.5	27.8	31.1	34.2	104.7	171.1	156.2	183.1	61.3	918.4	241.9	676.5
6. Discharge Below Pathfinder	6.8	4.5	2.0	0.9	0.8	0.2	0.2	87.8	149.4	148.1	137.4	10.7	548.8	15.4	533.4
7. Net Gain, Reconstructed	42.1	35.3	31.8	25.6	27.0	30.9	34.0	16.9	21.7	8.1	45.7	50.6	369.6	226.5	143.1
8. Future Conditions, Inflow to Path.	27.0	25.3	23.0	19.3	23.6	46.0	73.9	150.3	101.8	15.0	15.0	19.7	539.9	238.1	301.8
9. Reconstructed Water Fund, Pathfinder - Neb. Line	69.1	60.6	54.8	44.9	50.6	76.9	107.9	167.2	123.5	23.1	60.7	70.3	909.5	464.6	444.9
10. Historical Gain, Path. to Whalen	10.5	9.3	8.7	8.1	9.7	11.2	16.0	5.5	0.7	-11.9	13.7	12.2	95.6	75.5	20.2
						MEANS -- 1904-1940									
1. Run-off at Guernsey	70.1	30.2	20.2	20.4	21.7	40.2	85.9	230.8	363.3	294.1	233.2	152.0	1562.1	288.7	1273.4
2. Laramie River (a)	5.0	5.9	6.3	6.2	6.3	7.2	11.1	12.8	7.1	4.0	2.6	5.6	79.9	47.8	32.1
3. Kendrick Project Return Flow	9.4	9.0	8.0	5.0	5.0	6.0	7.5	7.4	7.5	7.7	11.3	12.2	96.0	49.9	46.1
4. Net Return Flow	19.2	13.5	10.6	8.1	7.2	7.1	6.1	0.7	9.6	10.8	19.8	25.0	137.7	71.8	65.9
5. Total	103.7	58.6	45.1	39.7	40.2	60.5	110.6	251.7	387.5	316.6	266.9	194.8	1875.7	458.2	1417.5
6. Discharge Below Pathfinder	44.5	12.9	10.0	9.9	7.9	17.8	39.4	158.5	324.7	287.1	228.4	133.9	1275.0	142.4	1132.6
7. Net Gain, Reconstructed	59.2	45.7	35.1	29.8	32.3	42.7	71.2	93.2	62.8	29.5	38.5	60.9	600.7	315.8	284.9
8. Future Conditions, Inflow to Path.	47.6	41.0	33.0	27.5	28.4	65.9	164.9	296.8	361.0	81.8	38.0	38.7	1224.5	408.2	816.3
9. Reconstructed Water Fund, Pathfinder - Neb. Line	106.8	86.7	68.1	57.3	60.7	108.6	236.1	390.0	423.8	111.3	76.5	99.6	1825.2	724.0	1101.2
10. Historical Gain, Path. to Whalen	25.6	17.3	10.2	10.5	13.8	22.4	46.5	72.2	38.5	7.0	6.9	18.2	287.0	146.0	141.0
						MEANS - 1931-1940									
1. Run-off at Guernsey	34.1	17.0	13.5	12.8	13.0	18.8	40.0	147.1	212.3	260.7	233.9	102.0	1105.2	149.2	956.0
2. Laramie River (a)	4.9	5.6	5.6	6.1	5.7	6.4	8.5	9.4	7.5	2.7	1.6	1.9	66.1	42.9	23.2
3. Kendrick Project Return Flow	9.4	9.0	8.0	5.0	5.0	6.0	7.5	7.4	7.5	7.7	11.3	12.2	96.0	49.9	46.1
4. Net Return Flow	19.2	13.5	10.6	8.1	7.2	7.1	6.1	0.7	9.6	10.8	19.8	25.0	137.7	71.8	65.9
5. Total	67.6	45.1	37.7	32.0	30.9	38.3	62.1	164.6	236.9	281.9	266.6	141.1	1405.0	313.8	1091.2
6. Discharge Below Pathfinder	15.4	4.0	2.7	3.0	1.7	0.8	6.3	114.7	203.2	263.5	228.1	77.3	920.8	34.2	886.6
7. Net Gain, Reconstructed	52.2	41.1	35.0	29.0	29.2	37.5	55.8	49.9	33.7	18.4	38.5	63.8	484.2	279.6	204.6
8. Future Conditions, Inflow to Path.	35.4	33.2	28.1	24.1	24.1	54.7	135.8	222.3	237.5	36.9	17.6	27.2	876.9	335.4	541.5
9. Reconstructed Water Fund, Pathfinder - Neb. Line	87.6	74.3	63.1	53.1	53.3	92.2	191.6	272.2	271.2	55.3	56.1	91.0	1361.0	615.0	746.0
10. Historical Gain, Path. to Whalen	18.7	13.0	10.8	9.8	11.3	18.0	33.7	32.4	9.1	-2.8	5.8	24.7	184.5	115.2	69.3

(a) Line 2 approximately as of 1938. Actual mean of period 1920-1939, May-Sept. 66.0, year 127.0.

A-38

A-39

IN THE

Supreme Court of the United States

No. 6 Original

THE STATE OF NEBRASKA,
Complainant,
vs.
THE STATE OF WYOMING,
Defendant,
THE STATE OF COLORADO,
Impleaded Defendant,
UNITED STATES OF AMERICA,
Intervener.

BRIEF OF DEFENDANT, STATE OF WYOMING

LOUIS J. O'MARR,
Attorney General.

W. J. WEHRLI,
Special Counsel.

PRAIRIE PUBLISHING CO., CASPER

Kendrick Project. It is a net supply arriving at Whalen for use below. The Master's proposed decree restricts irrigation from the main stream, exclusive of the Kendrick Project, between Alcova and Whalen to present uses. Therefore, this accretion will be available in any similar future period.

In addition, there was available during the drouth decade, 1931 to 1940, an average May-September accretion of 63,220 acre feet between Whalen and the Wyoming-Nebraska State line, as disclosed by Table III, Page 67 of the Master's Report. This did not include the Laramie River which, according to the same Table, made an average May-September contribution for the same years of 23,230 acre feet. From examination of the Whalen state line accretion, and the Laramie River inflow for such years of more plentiful supply as 1933 and 1938, as reflected by Table III, page 67 of the Master's Report, it is obvious that in periods of more favorable conditions the accretion in this section and the contribution of the Laramie River will be substantially more than the 1931-1940 averages. However, using the drouth decade values for these sources of supply, and adding to them an accretion of 141,000 acre feet, such as occurred on the average, 1904 to 1940, in the section between Alcova and Whalen, we have a total supply of 227,450 acre feet originating between Alcova and the state line in the May-September period. One source of additional supply above the Whalen-Tri-State Dam section has not heretofore been considered, nor it is mentioned in the Master's Report. Spring Creek, a tributary of the North Platte, enters the stream below the Wyoming-Nebraska state line and above the Tri-State dam. Testimony concerning same appears at pages 27387 to 27389 of the Record. and is reflected by Wyoming Exhibit No. 150. Since the exhibit itself discloses all pertinent information, same is incorporated in the Appendix, page 77, without inclusion of the related testimany. From this exhibit it appears that the average May-September contribution of this stream was 2,855 acre feet. A number of unusually dry years are included in this period and we think it safe to use a round figure value of 2,900 acre feet. Taking this supply into account, together with the accretions between Alcova and the state line, there is a total of 230,350 acre feet which, for conveniences, we will assign as 230,000. Therefore, of the 1,027,000 acre feet required in the May-September period in the Whalen-Tri-State Dam section, 230,000 is available from sources below Alcova.

Consequently, under average conditions prevailing in the 1904 to 1940 period, excepting only that we have used for accretions below Whalen and contribution of the Laramie River drouth decade values of 1931 to 1940 as taken from Table III, page 67 of the Master's Report, 230,000 acre feet may be supplied below Alcova, leaving the required release at Alcova 797,000 acre feet. The average annual evaporation loss of Pathfinder Reservoir is 45,000 acre feet, as shown in Column 9 of W-170 (Appendix pp. 38-39). If this is added to the required release of 797,000 acre feet the total is 842,000. While Pathfinder Reservoir has a capacity of 1,045,000 (M.R. p. 30), it is necessary to have available only 842,000 acre feet during the May-September period each year to supply the Master's proposed requirements for the Whalen-Tri-State Dam section. No winter release at Alcova is allowed and consequently the entire demand upon Pathfinder Reservoir is 842,000 acre feet, under the Master's proposals. This is the amount of water which it is necessary to have available in order to provide the lands dependent upon Pathfinder supply with the supply to which they are entitled under the Reclamation Act, which makes beneficial use the basis, the measure and the limit of the right. (Section 8 of the Reclamation Act of June 17, 1902, 32 Stat. 390, 43 U.S.C.A. 372.)

Coming now to consideration of additional supply required for the Kendrick Project, in conjunction with the demand upon the Pathfinder supply, we find that we must add to the required Pathfinder supply a May-September net consumptive use of the Kendrick of 162,000 acre feet, making a total of 1,004,000 acre feet. This is to say, that if this amount of water is available at Pathfinder, and if accretions below are taken into account, the demands of the North Platte project and the Kendrick and other users can be supplied. The 1904-1940 average recorded run-off at Pathfinder was 1,315,900 acre feet (M.R. p. 24) and this run-off reduced to present conditions of development is 1,293,000 acre feet (Col. 8, W-170, Appendix pp. 38-39). There is a liberal excess of average run-off over requirement; the difference between 1,004,000 and 1,293,000 being 289,000 acre feet. These values demonstrate the lack of any necessity for taking into account the total average run-off as measured against the total demand, and we think permit an adequate consideration of low years of run-off. Especially is this true when account is taken of the carry-over capacity of the reservoirs, their ability to conserve

recognize the equal rights of both and at the same time establish justice between them." (206 U. S. 97).

We do not believe, therefore, that the recommendations of the Master can be considered as interdependnt, and a part of them adopted and others rejected. Furthermore, if all of the recommendations are adopted, they do not make out a complete equitable apportionment or division between the states, for the reason that, as to the Whalen-Tri-State Dam section and the Kendrick Project, a type of administration only is advocated instead of a division of the supply between Wyoming and Nebraska. The proposals of paragraphs 3 and 4 of the recommendations for decree (M. R. pp. 177, 179) do not comprise a division of the supply between the two states, defining and limiting the amount of water which each is entitled to use, but only that certain individual projects in relation to each other shall be operated on a priority basis, and that certain limitations shall apply to the Nebraska state line canals-individually. Canals serving Nebraska lands, such as the Interstate, Fort Laramie and Northport, are not included in paragraphs 3 and 4, and of the total May-September supply for Nebraska which is recommended by the Master of 790,000 acre feet, the canals specifically mentioned represent only a demand of 259,787 acre feet.

Our conclusion is that the Court, in exercising jurisdiction for the making of an affirmative decree, should make a complete equitable apportionment between the three states. This can not be accomplished as simply as was done in Wyoming v. Colorado, 259 U. S. 419, where restricting the upper state to the use of a certain quantity of water served to fix the rights of both. Here there are three states; large supplies originate in Colorado and Wyoming; are impounded in Wyoming, and used in both Wyoming and Nebraska; and large storage reservoirs are located in Wyoming which can only be properly utilized by the conservation and carry over of water from year to year. Just recognition of the rights of each state makes imperative a decree defining completely the rights of each and imposing upon each the limitations necessary to prevent infringement of the rights of any other.

10. THE DECREE

We believe a decree should be entered in this cause as follows:

1. Enjoining Colorado (a) from the diversion of water for the irrigation in North Park of more than 135,000 acres of land, (b) from the accumulation in storage facilities in North Park of more than 17,000 acre feet of water between October 1 of any year and September 30 of the following year, and (c) from the transbasin diversion out of North Park of more than 6,000 acre feet of water between October 1 of any year and September 30 of the following year.

2. Enjoining Wyoming (a) from the diversion of water from the main river above Guernsey and from its tributaries above Pathfinder Reservoir for the irrigation of more than 168,000 acres of land, and (b) from the accumulation of storage water in reservoirs above Pathfinder Reservoir in excess of 18,000 acre feet of water between October 1,of any year and September 30 of the following year. This is exclusive of Seminoe Reservoir and the Kendrick Project, which are given consideration elsewhere.

3. Enjoining Wyoming from the diversion of water from the North Platte River for the irrigation of lands of the Kendrick Project and the Wyoming lands served by diversions at and below Whalen of more than 405,000 acre feet in each irrigation season, May to September inclusive, providing that until five years have elapsed immediately following the commencement of irrigation of lands of the Kendrick Project, the limitation shall be 342,000 acre feet, and further providing that irrigation under the Kendrick Project shall not be commenced until the first year in which storage in the upper storage reservoirs, Seminoe, Pathfinder and Alcova, plus anticipated in-flow equals 1,000,000 acre feet, and that until the year in which such irrigation is commenced, the Wyoming allotment shall be 237,000 acre feet.

4. Enjoining Nebraska from the diversion of water from the North Platte River in the Whalen-Tri-State Dam section for Nebraska lands of more than 705,000 acre feet in each irrigation season, May to September inclusive, and from obtaining the conveyance past the Tri-State Dam of any water originating above that point for diversion from the North Platte River below Tri-State Dam, and permitting diversion of 73,000 acre feet to the inland reservoirs of the Pathfinder Irrigation District, Lakes Alice and Minatare, during the winter months, October 1st to April 30th, inclusive.

5. Providing that the May-September supplies mentioned in the preceding paragraphs 3 and 4 shall be delivered in accordance

with the needs of the appropriators served thereby, and that as a guide to such deliveries, monthly distribution of such May-September supplies, unless otherwise requested, shall be made as follows: 11 per cent in May; 24 per cent in June; 26 per cent in July; 24 per cent in August, and 15 per cent in September.

6. Providing that in the event of shortage of the May-September supplies provided for in paragraphs 3 and 4, same shall be sustained by Wyoming and Nebraska in proportion to the respective allotments to each state, and providing that excesses comprising uncontrolled supplies from reservoir spills originating during the May-September months may be diverted by Wyoming and Nebraska in proportion to the respective allotments made in paragraphs 3 and 4 above.

7. Requiring such additional gauging station and measuring devices at or near the Wyoming-Nebraska state line, if any, as may be necessary for effecting the apportionment decreed above, to be constructed and maintained at the joint and equal expense of Nebraska and Wyoming.

8. Providing that the injunctions herein contained shall not comprise any restriction upon the diversion from the North Platte River and tributaries in Colorado and Wyoming of water for ordinary and usual domestic, municipal and stock-watering purposes.

9. Permitting any of the parties to apply at the foot of the decree for its amendment or for further relief, and retaining jurisdiction of the suit for the purpose of any order, direction or modification of the decree or any supplementary decree that may at any time be deemed proper in relation to the subject matter in controversy, provided that any application for amendment, modification or further relief shall not be made within ten years from date of the decree.

Explanation of Paragraphs 1 and 2

Paragraph 1 is identical with the same numbered paragraph of the Master's recommendations (M.R. p. 177).

Paragraph 2 is identical with the corresponding paragraph of the Master's recommendations, except the last sentence which has been added for purposes of clarity. The 168,000 acres mentioned in paragraph 2 is comprised of 153,000 irrigated from the main stream and tributaries above Pathfinder, (M.R. p. 135) and 15,000 from the main stream between Pathfinder and

tion, reservoir spills occurred in 21 of the 37 years, comprising a total quantity of 9,721,000 acre feet. Under similar conditions of supply, which may be reasonably anticipated because of nature's tendency to repeat itself, there will be uncontrolled supplies, and in paragraph 6 we propose that these may be enjoyed by Wyoming and Nebraska in proportion to the respective allotments of paragraphs 3 and 4. This is not perhaps of great importance because when these spills occur, conditions are such there is not great need for the water. It is a matter upon which no difficulty need be anticipated.

Explanation of Paragraphs 7, 8 and 9

Paragraph 7 is identical with the same numbered paragraph of the Master's recommendations (M.R. p. 179). It may not be necessary but its insertion is not injurious, and we favor its retention.

Paragraph 8 brings into the decree matters mentioned in the third paragraph at page 180 of the Master's Report, which we think should be incorporated. The recommendation has been broadened by including water for stock-watering purposes, and clarified to include diversions from tributaries as well as from the main stream.

Paragraph 9 is the same as paragraph 8 of the Master's recommendations (M.R. p. 179), excepting that we have added a proviso that application for ammendment or modification of the decree shall not be made within ten years from date of same. Under the heading "A Complete Equitable Apportionment Should Be Made", we have endeavored to point out that any decree which is rendered should be complete in itself at the time of rendition, making an entire apportionment as between the litigant states. We do not, however, contend that a decree must necessarily be final, and therefore believe that paragraph 9 should be included. At least in one respect the decree should not have finality, and that is as to possible additional development above Whalen in Wyoming and Colorado. The Wyoming study comprised in Wyoming exhibits 170 to 176 inclusive, it will be recalled, discloses that after supplying all existing needs and the Kendrick Project over the 37 year period, 1904 to 1940, reservoir spills of 9,721,000 acre feet from the upper storage reservoirs occurred. This water in any similar future period of run-off might be put to beneficial use at some point above

IN THE

Supreme Court of the United States

No. 7 Original

THE STATE OF NEBRASKA,
Complainant,
vs.
THE STATE OF WYOMING,
Defendant,
THE STATE OF COLORADO,
Impleaded Defendant,
UNITED STATES OF AMERICA,
Intervener.

EXCEPTIONS OF DEFENDANT, THE STATE OF WYOMING, TO THE REPORT OF MICHAEL J. DOHERTY, SPECIAL MASTER.

In these Exceptions, reference is made to the Master's Report by designation "M.R." followed by the appropriate page numbers, and references to the Exhibits introduced by Nebraska, Wyoming, Colorado and the United States by the letters "N", "W", "C" and "U.S." followed by the number of the particular exhibit.

While the subject matter of the Exceptions can not be completely segregated under different topics, certain headings will be inserted which may be helpful in correlating the Exceptions with the Report.

the Whalen-Tri-State Dam section, such shortages being of common occurrence in most irrigation projects.

XXVIII

As to paragraph 5 of the recommendations for decree, Wyoming does not object to an injunction against diversions above Alcova in lieu of Kendrick return flow, but does except to any restriction upon use of Kendrick return flow by appropriators below Alcova, for the reason that said return flow will become a part of the natural flow of the stream subject to diversion and use by Wyoming appropriators, as well as by those of Nebraska, and for the further reason that Wyoming's use from the main stream between Alcova and Guernsey will be limited by the provisions of paragraph 2, and for the further reason that any apportionment of the supply in the Whalen-Tri-State Dam section must include all natural flow there available, and must inevitably include Kendrick return flow.

XXIX

Wyoming excepts to the provisions of paragraph 8 of the recommendations for decree, and urges the Court to make and enter such decree herein as will be a complete equitable apportionment between the litigant States, leaving open for future consideration only the question of additional development above Whalen in Wyoming and Colorado. Further in connection with the recommendations of paragraph 8, Wyoming proposes that no application for modification should be permitted within a period of less than five years, and preferably ten years, from entry of decree herein.

XXX

Wyoming urges that the recommendation of the Master as to the ues of water for domestic and other purposes contained at page 180, should be clarified and rewritten as follows:

> "The parties are agreed that there should be no restriction upon the diversion from the North Platte River and **tributaries** in Colorado or Wyoming of water for ordinary and usual domestic, municipal and **stock-watering** purposes and nothing in the decree is intended to, or will interfere with such diversions and uses."

In The

SUPREME COURT OF THE UNITED STATES

No. 6 Original. October Term. 1945.

THE STATE OF NEBRASKA. COMPLAINANT.

V.

THE STATE OF WYOMING. DEFENDANT.

AND

THE STATE OF COLORADO. IMPLEADED DEFENDANT.

THE UTITED STATES OF AMERICA. INTERVENOR.

COMPLAINANT'S PROPOSED FORM OF DECREE AND REQUEST FOR PERMISSION TO OPPOSE PROPOSALS OF OTHER PARTIES.

WALTER R. JOHNSON,
Attorney General of Nebraska.
JOHN L. RIDDELL,
Assistant Attorney General of Nebraska.
PAUL F. GOOD,
Special Counsel.
For Complainant.

A.

INTRODUCTORY.

Pursuant to the permission granted by this court (Opinion, page 53) the complainant, State of Nebraska,

submits the following as its proposal for a form of decree to carry into effect the decision of this court as evidenced by its opinion filed June 11, 1945. Unfortunately, the parties, after a two day conference, were unable to agree upon a form to be submitted except in part. Upon certain particulars there was substantial agreement, and in the following proposal, the complainant has endeavored to follow the pattern which the other parties wish to follow, and where there was substantial agreement, has endeavored to follow the exact language proposed by the other parties.

In the following proposal reference is made in marginal notes to the court's opinion or the Master's Report in respect to particular items which the respective portions of the decree are intended to cover. Every effort has been made by complainant correctly to reflect the intention of the court as evidenced by the opinion and by the Master's Report where the opinion adopts that report.

B.

DECREE.

This cause having heretofore, on March 5, 6 and 7, 1945. been argued and submitted upon exceptions to the Special Master's Report, and an opinion having been rendered by this court on June 11, 1945.

Now, Therefore, pursuant to said opinion and in order to carry it into effect, the following decree is hereby entered:

It Is Ordered, Adjudged and Decreed:

I.

The State of Colorado, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River and its tributaries for the irrigaton of more than a total of 135,000 acres of land in Jackson County, Colorado, during any one irrigation season;[1]

(b) From storing or permitting the storage of more than a total amount of 17,060 acre feet of water from the North Platte River and its tributaries in Jackson County, Colorado, between October 1 of any year and September 30 of the following year;[1]

(c) From exporting out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, to any other stream basin or basins more than 60,000 acre feet of water in any period of ten consecutive years from and after October 1, 1945, reckoned in continuing progressive series in such manner that during the ten year period ending September 30, 1955, and during each and every ten year period ending on each and every September 30th thereafter no more water may be exported, transbasin from Jackson County, Colorado, than will make up an aggregate of 60,000 acre feet.[2]

II.

Exclusive of the Kendrick Project and Seminoe Reservoir[3] the State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

1. Opinion, page 24; Master's Report, p. 177.
2. Opinion, page 25.
3. Opinion, page 26.

(a) From diverting or permitting the diversion of water in Wyoming from the North Platte River above the Guernsey Reservoir and from the tributaries entering the North Platte River above the Pathfinder Dam for the irrigation of more than a total of 168,000 acres of land during any one irrigation season.[4]

(b) From storing or permitting the storage of more than a total amount of 18,000 acre feet of water from the North Platte River and its tributaries above the Pathfinder Reservoir between October 1 of any year and September 30 of the following year.[4]

III.

The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe and Alcova Reservoirs otherwise than in accordance with the relative storage rights as among themselves of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir; and
Fourth, Alcova Reservoir;

Provided, however, that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electic power when and only when such storage or release will not materially interfere with the administra-

4. Opinion, page 26; Master's Report, p. 177.

may be necessary for making any apportionment herein decreed, shall be constructed and maintained at the joint and equal expense of Wyoming and Nebraska to the extent that the costs thereof are not paid by others.[9]

VIII.

The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from diverting or permitting the diversion of water from the North Platte River or its tributaries at or above Alcova Reservoir in lieu of or in exchange for return flow water from the Kendrick Project reaching the North Platte River below Alcova Reservoir.[10]

IX.

The State of Wyoming and the State of Colorado be and they hereby are each required to prepare and maintain complete and accurate records of the total area of land irrigated and the storage and exportation of the water of the North Platte River and its tributaries within those portions of their respective jurisdictions covered by the provisions of paragraph I and II hereof, and such records shall be available for inspection at all reasonable times.[11]

X.

This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and

9. Opinion, pp. 50-51: Master's Report, p. 178.
10. Opinion, pp. 34-35: Master's Report, pp. 178-179.
11. Opinion, pp. 52-53.

usual domestic municipal and stock watering purposes and consumption."

XI.

For the purposes of this decree:

(a) "Season" or "seasonal" refers to the irrigation season, May 1 to September 30 inclusive;

(b) The term "storage water" as applied to releases from reservoirs owned and operated by the United States is defined as any water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet natural flow uses permitted by this decree;"[12]

(c) "Natural flow water" shall be taken as referring to all water in the stream except storage water;"[13]

(d) Return flows of the Kendrick Project shall be deemed to be "natural flow water" when they have reached the North Platte River, and subject to the same diversion and use as any other natural flow in the stream."[14]

XII.

That the allotment of water for Northport Canal as recommended by the Special Master and incorporated in the opinion herein, — U. S.—, (Opinion, p. 47) be and the same hereby is revised to allow a maximum from all sources for the irrigation of 13,000 acres of

12. Opinion, page 52; Master's Report, p. 180.
13. Opinion, p. 32.
14. Opinion, pp. 48-50.
15. Opinion, pp. 34-35.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 6 Original

THE STATE OF NEBRASKA, COMPLAINANT,

vs.

THE STATE OF WYOMING, DEFENDANT,

and

THE STATE OF COLORADO, IMPLEADED DEFENDANT,

THE UNITED STATES OF AMERICA, INTERVENOR.

FORM OF DECREE PROPOSED BY THE STATE OF WYOMING, DEFENDANT, THE STATE OF COLORADO, IMPLEADED DEFENDANT, AND THE UNITED STATES OF AMERICA, INTERVENOR.

I.

INTRODUCTION

The State of Wyoming, defendant, the State of Colorado, impleaded defendant, and the United States of America, intervenor, jointly submit herewith a proposed form of decree in the above case. This action is taken under the permission contained in the concluding paragraph of the opinion of the Court announced June 11, 1945.

The parties making this proposal have heretofore re-

ceived a copy of the form of decree proposed by the State of Nebraska, complainant. Conferences had previously indicated the impossibility of an agreement between these parties and Nebraska on certain decretal provisions. Following the proposed form of decree herein there appears an explanatory statement covering those matters of substance on which these parties have been unable to agree with Nebraska.

II.

PROPOSED FORM OF DECREE

This cause having been heretofore submitted on the report of the Special Master and the exceptions of the parties thereto, and the Court being now fully advised in the premises:

It is ordered, adjudged and decreed that:

I. The State of Colorado, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River and its tributaries for the irrigation of more than a total of 135,000 acres of land in Jackson County, Colorado, during any one irrigation season;

(b) From storing or permitting the storage of more than a total amount of 17,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries in Jackson County, Colorado, between October 1 of any year and September 30 of the following year;

(c) From exporting out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, to any other stream basin or basins more than 60,000 acre feet of water in any period of ten consecutive years reckoned in continuing progressive series beginning with October 1, 1945.

II. Exclusive of the Kendrick Project and Seminoe

portions of their respective jurisdictions covered by the provisions of paragraphs I and II hereof, and such records shall be available for inspection at all reasonable times; provided, however, that such records shall not be required in reference to the water uses permitted by paragraph XI hereof.

XI. This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal, recreational and stock watering purposes and consumption.

XII. For the purposes of this decree:

(a) "Season" or "seasonal" refers to the irrigation season, May 1 to September 30, inclusive;

(b) The term "storage water" as applied to releases from reservoirs owned and operated by the United States is defined as any water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet natural flow uses permitted by this decree;

(c) "Natural flow water" shall be taken as referring to all water in the stream except storage water;

(d) Return flows of the Kendrick Project shall be deemed to be "natural flow water" when they have reached the North Platte River, and subject to the same diversion and use as any other natural flow in the stream.

XIII. This decree shall not affect:

(a) The relative rights of water users within the State of Colorado.

(b) Such claims as the United States has to storage water under Wyoming law nor in any way interfere with the ownership and operation by the United States of the various federal storage and power plants, works and facilities.

a typographical error. The correct figure which conforms to the opinion of the Court, p. 24, and the Master's Report, p. 177, is "17,000."

2. The Joint proposal includes, and the Nebraska proposal omits, in the forepart of this paragraph after the word "water" the phrase "for irrigation purposes." This phrase is appropriate and necessary for the following reasons:

(a) The issues made up by the pleadings in this case only involved water uses for irrigation purposes, and the Court specifically states (Opinion p. 1) that "the controversy pertains to the use for irrigation purposes of the water of the North Platte River, a non-navigable stream."

(b) If this phrase is omitted, Paragraph IX Nebraska Proposal—Paragraph X Joint proposal—would require records of storage in stock ponds, municipal water tanks, and fish ponds.

(c) If this phrase is omitted, there is an inconsistency with Nebraska Paragraph X — Joint Paragraph XI.

B.

NEBRASKA PARAGRAPH I (C)
JOINT PARAGRAPH I (C)

The Joint Proposal uses the language "any period of 10 consecutive years reckoned in continuing progressive series beginning with." This phrase is taken from the Colorado River Compact executed in 1922 and has well understood significance. The Nebraska proposal adds an explanatory provision which does not clarify and which may confuse.

be made relative to the claims of Nebraska users diverting below Tri-State for water from upstream areas. In other words, without a provision, such as Paragraph VI of the Joint proposal, there is nothing in the decree to prevent Nebraska, or one of its canals diverting below Tri-State, from demanding that upstream water be passed below Tri-State Dam.

I.

NEBRASKA PARAGRAPH VI
JOINT PARAGRAPH VII

This paragraph in each proposal deals with the proposition that the decree apportions only natural flow. The second sentence of the Nebraska paragraph is unnecessary.

Discussing apportionment of storage water, the Court, after reference to excessive diversions, said:

> "We can not assume that an apportionment of storage water is necessary to prevent a recurrence of those practices." (Opinion, p. 39)

The language employed in the concluding clause of paragraph VII of the Joint proposal is taken directly from the Court's opinion. Without giving the basis of the Court's conclusion, any statement that the decree apportions natural flow only is incomplete and can only lead to misunderstanding.

J.

NEBRASKA PARAGRAPH IX.
JOINT PARAGRAPH X

The difference between the parties here is that under the Joint proposal the provision suggested by Nebraska is followed by this proviso: "Provided, however, that such records shall not be kept in reference to water uses permitted by Paragraph XI hereof." Inasmuch as the Court

does not place any limitation on such uses (Opinion p. 52), there is no need for the keeping of records thereof.

K.

NEBRASKA PARAGRAPH X
JOINT PARAGRAPH XI

The Joint proposal differs from that of Nebraska in that after the word "municipal" near the end of Joint paragraph XI the word "recreational" in inserted. The portion of the North Platte Basin above Pathfinder Reservoir in both Wyoming and Colorado is a wild life area visited by many sportsmen and vacationists in the summer period. Numerous small ponds have been constructed to aid in the propagation and preservation of fish and wild life. It seems but right to exempt these from the provisions of the decree.

L.

NEBRASKA PARAGRAPH XII

The Joint proposal contains no counterpart to Nebraska Paragraph XII. The matter contained in the Nebraska proposal is a finding by the Court, and it is neither necessary nor appropriate to insert it in the decree.

M.

NEBRASKA PARAGRAPH XIII (A)
JOINT PARAGRAPH XIII (A)

The difference between the parties here is that the Joint proposal in this regard is restricted in its application to the State of Colorado, whereas Nebraska would extend the application to all three states.

In its opinion (p. 25) the Court said: "Nor will the decree interfere with relationships among Colorado's water

In The

SUPREME COURT OF THE UNITED STATES

No. 6 Original, October Term, 1945.

THE STATE OF NEBRASKA, COMPLAINANT,

V.

THE STATE OF WYOMING, DEFENDANT,

AND

THE STATE OF COLORADO, IMPLEADED DEFENDANT.

THE UNITED STATES OF AMERICA, INTERVENOR.

OBJECTIONS OF STATE OF NEBRASKA TO JOINT PROPOSAL FOR DECREE FILED BY STATE OF WYOMING, DEFENDANT, STATE OF COLORADO, IMPLEADED DEFENDANT, AND UNITED STATES OF AMERICA, INTERVENOR.

WALTER R. JOHNSON,
Attorney General of Nebraska,
JOHN L. RIDDELL,
Assistant Attorney General of Nebraska,
PAUL F. GOOD,
Special Counsel,
For Complainant.

I.

INTRODUCTORY.

As requested, pages 14 to 15, in the proposed form of decree, proposed by Nebraska, we hereby present our objections to the form of decree as proposed jointly by the other parties to this suit. Nearly half of the document filed as the form of decree jointly proposed consists of criticisms of the Nebraska proposal and of argument purporting to explain why the joint proposal is superior. We believe that the court will agree that fairness requires that Nebraska be permitted to present its reasons in support of its form of decree and to point out wherein the joint proposal departs from the opinion. Therefore, even though we have not received express permission, we present the following as our objections and criticisms of the joint proposal.

II.

OBJECTIONS AND CRITICISM OF JOINT PROPOSAL.

A.

Nebraska Paragraph I (B)
Joint Paragraph I (B)

1. The figure of "17,060" appearing in the second line of the paragraph as proposed by the State of Nebraska is a typographical error, and the joint proposal properly corrects it to conform to the opinion of the court page 24, and the Master's Report, page 177, so that it will read "17,000."

2. The joint proposal inserts in the fore part of this paragraph after the word "water" the phrase "for irriga-

tion puposes." This qualification does not appear either in the opinion, page 24, or the Master's Report, page 177, where this phase of the controversy is discussed. Complainant feels that the omission was deliberate and that both the Master's Report and the opinion means what it says in limiting the storage for all purposes. Our reasons are as follows:

(a) While the controversy primarily pertains to the use of water for irrigation purposes, uses and disposition of water upstream interfere with the availability of water for irrigation in Nebraska just as much where the uses are for one purpose as another. Nebraska sought protection of its irrigation rights. When Colorado stores water for any purpose, this storage is to that extent an interference with the irrigation rights of Nebraska water users.

(b) It is contended that if this phrase is omitted, there is an inconsistency with Nebraska Paragraph X - Joint Paragraph XI. We feel that this complaint is hypercritical. Nebraska Paragraph X makes a blanket exception from the decree for all purposes, of water for ordinary and usual domestic, municipal and stock watering purposes. This exception does not need to be repeated in each paragraph of the decree which controls the actions of the upper states.

B.

Nebraska Paragraph I (C)
Joint Paragraph I (C)

Complainant contends that the language included in Nebraska's Paragraph I (c) and in the last seven lines

since if this were done, the decree would be merely a repetition of the opinion.

J.

Nebraska Paragraph IX
Joint Paragraph X

The proviso eliminating the water uses excepted in the next succeeding paragraph, from the requirement as to measurements and records, we believe is unnecessary and is not included in the opinion, pages 52 to 53.

K.

Nebraska Paragraph X
Joint Paragraph XI

The opinion, page 52, Master's Report, page 180, excepts from the restrictions of the decree water for ordinary and usual domestic and municipal purposes and consumption. Now, as an afterthought, it is proposed that recreational uses should also be excepted. This term is of such broad import that we believe it should not be permitted. Under it, either Colorado or Wyoming might construct an artificial lake for boating purposes containing many thousands of acre-feet of water. While recreation has its place, we do not believe that recreational uses are in the same class as domestic, municipal and stock watering purposes, and we believe that they should not take precedence over irrigation. The exception as to recreational purposes is not found in either the opinion or the Master's Report.

NEBRASKA V. WYOMING;
COLORADO IMPLEADED,
UNITED STATES, INTERVENOR

MEMORANDUM REGARDING PROPOSED FINDINGS AND DECREE

In considering the problems presented by this case, and in the search of a solution, very little real guidance can be drawn from precedent, and conversely very little limitation is imposed by settled authority. There appears to be no more concrete controlling rule than is found in the general principle of "equitable distribution". As to the method of accomplishing equitable distribution, the field is open. It is true that in Wyoming v. Colorado the Supreme Court adopted for that case the principle of priority of appropriation as the basis of allocation of the water of an interstate river, and said that:

> "It furnishes the only basis which is consonant with the principles of right and equity applicable to such a controversy as this is."

But there it was found possible to give the desired effect to the priority principle by a comparatively simple allocation en masse of the water of the Laramie. Here there is no such possibility. That is conceded. The impossibility is strongly emphasized by Nebraska's Exhibit 428, which shows that the priorities on the main river fall into one hundred thirteen (113) different brackets or strata alternating throughout between the three states and presenting insuperabledifficulties to any attempt to make corresponding mass allotments of water. On the other hand, there is admittedly no precedent for Nebraska's proposal of an administration of the river according to a complete interstate priority schedule. The nearest approach to it is the enforcement decreed in some cases of priorities as between individual appropriators in different states.

hardship of this is minimized by limitation of the required deliveries to the historical minimums, but this in turn is also open to the objection that it has the effect of awarding to the upper areas all water in excess of the historical minimums, which in all instances, except that of the fifteen-year average, would be dry cycle minimums. Unless the supplies of the future approach in the downward direction the historical minimums, the United States plan would not operate to place any restriction on the river sections above Guernsey, since the minimum run-offs were themselves not due to any limitation or regulation but to physical unavoidability. They represent water which the appropriators of the section in question either did not want or for some reason could not divert. The United States plan is carefully worked out and has much to recommend it. However, I hope that an adequate method of distribution can be devised less intricate and regimentary in character.

All parties are agreed that there are no key stations, so called, where distribution could be regulated to correspond automatically with variations in supply, a feature of many of the interstate compacts.

There remains as the means of obtaining some degree of flexibility the alternative, and perhaps only the alternative, of an "open" decree, that is, one avowedly subject to revision with the occurrence of well-defined changes in supply or with other demonstration by experience of the necessity for such revision. This would be far from an ideal solution of the problem, but it may be open to less serious objection than any form of closed decree which could be framed. Much better it would be if a decree could be drawn which would finally end permanently end the controversy with assurance of justice to all concerned. Such a decree, I am afraid, would only be possible, if at all, under

conditions more normal and stable than those under which the present suit must be decided.

A rule that would seem elementary to equitable distribution (even aside from rights based on priority statutes) is that present rightful uses should be provided for before consideration is given to further possible development. And in view of the possibility that the present demand may substantially exhaust or exceed the present resources of the river, I should say, generally speaking, that no reservation should be made for future development (assuming such reservation ever to be proper) unless and until it is demonstrated that the supply under future conditions shall be more than adequate to serve existing demands. A development actually in process of completion under a perfected right should probably be accorded the status of a present use in relation to enterprises projected but dormant and undertain of completion.

PROPOSED SOLUTION

I have in mind a report conforming to the following general principles and including:

(a) Findings on all of the basic facts so far as the evidence will permit, and conclusions on all of the pertinent issues of law.

(b) A water distribution by means of the imposition of a minimum of restriction and by the simplest possible method that will serve present and near future purposes.

(c) Provision for the appointment of a water master to make observation, study, and reports. Possibly some other title would be more appropriate.

(d) Provision for retention by the Court of jurisdiction to amend the decree upon the reports of the water master, from which it shall appear that important changes

conditions have occurred or that findings involving elements of assumption or forecast as to future developments or conditions, upon which the decree was based, have by subsequent experience proven erroneous, and that by reason of such change of conditions or error equity requires an amendment of the decree. Certain matters might be expressly reserved as possible subjects for future consideration on application for amendment of the decree. Also opportunity for showing in addition to or in opposition to the water master's reports might be allowed, although the report should largely control on all matters of fact. Applications for amendment should be limited to intervals of reasonable length, and the provision should be so safeguarded as not unduly to invite or encourage frequent or unjustifiable attacks on the decree.

More specifically I propose to:

(1) Limit Colorado to present uses.

(2) Limit Wyoming, in respect to the river section above Pathfinder, to present uses.

(3) Require observance by Pathfinder, Guernsey, Seminoe, and Alcova of priorities in relation to seniors below each reservoir respectively down to and including the Tri State Canal.

(4) Require similar observance of priorities by the Casper Canal.

(5) Impose on the Pathfinder-Guernsey section some simple form of limitation, if any suitable can be thought of or suggested which would not require regulation of a character unjustified by the very limited extent of any possible excess of diversions.

(6) Distribute on a priority basis the water

available within the Whalen-Tri-State Dam section to the projects diverting in that section any water in excess of the defined allotments to be either reapportioned in that section or passed across the state line.

With this preface I shall pass to consideration of the several sections of the river, the facts as I expect (more fully) to find them, and my conclusions.

COLORADO

The area in Colorado with which we are concerned is North Park, substantially coincident with Jackson County. It is the source of the North Platte River. The drainage area on the river and its tributaries in the Park is about 1650 square miles. The altitude ranges from 7,800 feet to 9,000 feet above sea level. The climate is arid, the average precipitation in the

seniors below were short. Of the total out-of-priority diversions for the 1931-1936 period claimed by Nebraska against Wyoming's private canals, which according to my footing is 284,804 acre feet, 87,112 acre feet,or 29 per cent, are charged to the Pathfinder-Guernsey section, and 71 per cent to the Guernsey-State Line section. This would be an average of 14,518 acre feet for the year. Of the out-of-priority diversions attributed to the Pathfinder-Guernsey section (omitting 1935, for which I find no figures for the individual canals), 42 per cent is laid to the Douglas Canal alone and over 60 per cent to the Douglas, Running Dutchman, and Platte Valley Ranch projects. The Nebraska figures, of course, include diversions claimed to be out of priority in relation to canals below the Tri-State Dam, and would be much lower if related only to the project and State Line Canals.

(Note: The out-of-priority figures appearing above apparently do not take into account all of the corrections in original Nebraska exhibits. Nebraska's total for the six years is 12,442 acre feet above the figure of 294,604. However, the proportion will probably not differ materially.)

On the tributary streams the run-offs are of shorter duration even than those above Pathfinder. The flows reach their peak in May, fall off rapidly during June, and usually run dry by the first of July. Except for the LaPerle project (irrigating about 11,000 acres) the diversions are small. How many there are does not appear. Evidently there are at least several hundred. Perhaps the number could be spelled out from Nebraska's Exhibit 93, which lists all the Wyoming rights except those on the Laramie River and Horse Creek. The total number of rights listed is 4,654. The tributary streams are usually dry before there is any serious shortage of water in the river, and no regulation of the diversion would be of any material benefit to users below. There

appears to be no demand for any limitation upon them. On the oral argument it was suggested that further construction of storage facilities should be restricted, since the result of such construction might be to reduce the outflow from the tributaries now available for storage in the off-channel reservoirs of the Interstate Canal. However, there is no showing as to what contribution, if any, these tributaries now make to the supply for the reservoirs or what additional storage projects may be feasible or what the effect of their construction and use might be on the supply otherwise available for Alice and Minatare. There is little basis for assuming that there is any threat from this source requiring a prohibition in the decree.

What should be done about this section? The main river diversions are within close enough proximity to the Guernsey-State Line section to have an appreciable effect on the supply in the latter section. It seems but fair and equitable that it should share with the lower section both shortages and abundances of water. On the other hand, the effect of any reasonable regulation would be relatively small. The benefit to the project canals particularly would be slight. The total consumption by the rights junior to the project, under conditions of adequate supply, would not exceed 10,000 acre feet annually. According to Nebraska's out-of-priority study, the worst offenders in the section were the Douglas, Running Dutchman, and Platte Valley Ranch ditches. The Douglas is senior to the North Platte project. The Running Dutchman is about 70 per cent, and the Platte Valley Ranch about 33 per cent senior. To put under regulation all the little diversions from Pathfinder to Guernsey, ranging in size from 10 acres up, would seem to involve a burden and effort rather disproportionate to the realizable result.

Wyoming suggests allotment to the Pathfinder-Guernsey